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U.S. Judge advocate general Dept Army

**A DIGEST OF OPINIONS OF THE
JUDGE ADVOCATE GENERAL
CERTAIN DECISIONS OF THE COMP-
TROLLER OF THE TREASURY**

THE COURTS

AND

**CERTAIN OPINIONS OF THE
ATTORNEY GENERAL**

**FROM JULY 1, 1912
TO APRIL 1, 1917**

**WASHINGTON
GOVERNMENT PRINTING OFFICE**

1917

WAR DEPARTMENT
Document No. 572,
Office of The Adjutant General.

DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL, CERTAIN DECISIONS OF THE COMPTROLLER OF THE TREASURY AND THE COURTS, AND CERTAIN OPINIONS OF THE ATTORNEY GENERAL.

JULY 1, 1912, TO APRIL 1, 1917.

BULLETIN 12.

BULLETIN }
No. 12. }

WAR DEPARTMENT,
WASHINGTON, *August 8, 1912.*

The following digest of opinions and decisions rendered by the Judge Advocate General, the Comptroller of the Treasury, the Attorney General, and the courts is published for the information of the service in general.

It is intended to embrace all important opinions rendered by the Judge Advocate General from January 31, 1912, to which date, inclusive, the latest published Digest of said opinions extends, to June 30, 1912, inclusive; but it has been deemed proper to publish some of earlier date which could not be included in the General Digest or the importance of which seemed to justify further publication.

The other opinions and decisions which have been digested and which are deemed of special importance to the service cover practically the same period, but for obvious reasons embrace many that are of date prior to the publication of the last Digest and could not be noted therein.

It is the purpose to make this and similar bulletins issued at stated times the basis of supplements to the published Digest and in this manner to keep the same up to date as far as practicable.

[1931376, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

HENRY P. McCAIN,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY: Retiring board; action of President on report of.

The President may not modify the finding of a retiring board. He may approve or disapprove the finding, but, subject to his right

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claimed to believe that the deserter intended to escape. *Held*, that the police officer was not entitled to the reward for the apprehension and delivery of a deserter.

(C. 17327, May 29, 1912.)

DESERTERS: Reward for apprehension; confined in prison.

A bertillion clerk at a State penitentiary informed the military authorities that a prisoner at that institution was probably a deserter, which information led to his apprehension and arrest by said authorities immediately upon the termination of his term of imprisonment. The other penitentiary officers did nothing more than turn the prisoner over to the military authorities at the end of his term, and disclaimed any interest in the reward. *Held*, that the person furnishing the information was entitled to the entire reward offered for the return of the deserter and that it was not necessary that he should personally have made the arrest and delivery to the military authorities.

(C. 17327-B, Feb. 9, 1912.)

DESERTERS: Reward for apprehension; delivered as absent without leave, but tried for desertion.

Where a police officer delivered to the military authorities a soldier as having been absent without leave, but who was later deemed by those authorities to be a deserter and was tried as such. *Held*, that the police officer is entitled to a reward as having apprehended and delivered a deserter, and this though the soldier was acquitted of desertion and convicted of absence without leave only.

(C. 17327-B, Apr. 17, 1912.)

DISCIPLINE: Punishment in reducing from first-class private.

The maximum punishment order provided that for certain offenses first-class privates might be reduced to second-class privates. Pursuant to this order a first-class private of the Signal Corps was sentenced to "be reduced from first-class private to second-class private." At the time the only privates in the Signal Corps were "first-class privates" and "privates." There were no "second-class privates." *Held*, that as the only grade below that of first-class private was private, the effect of the sentence was to reduce the soldier to the grade of private.

(C. 3694, May 20, 1912.)

EIGHT-HOUR LAW: Government employees; extraordinary emergency.

Under the act of August 1, 1892 (27 Stat., 340), it does not constitute a sufficient statement of an extraordinary emergency to report merely that a laborer or mechanic was employed overtime on account of "working aloft as rigger," "extra attention required to floating plant," "repairing derrick," "repairing machinery of work-

equal to six months' pay of an officer or enlisted man on notice of his death from wounds or disease "not the result of his own misconduct," the above rule preventing recovery in case of contributory negligence can not be applied as a test of whether six months' pay shall be paid to the beneficiary of the deceased officer or soldier. This is for the reason that "misconduct," which is the test applied by the above acts, implies something in the nature of intentional wrongdoing, the transgression of some established rule, military, civil, or moral, or a reckless disregard of one's safety, etc. Carelessness or an accident on the part of the deceased officer or soldier not amounting to "misconduct" will not defeat payment to the beneficiary.

(C. 23666, June 25, 1912.)

GRATUITY: Payable on death of soldier; soldier's misconduct.

Where a soldier absent from his station, whether with or without leave, trespasses upon private property, he assumes the risk of injury resulting from such a trespass, and such an injury would be not in line of duty and would be the result of his own misconduct. (C. 23666, Aug. 4, 1909; Oct. 4, 1910.) The determination whether a soldier's death while trespassing on tracks of a railroad company is in line of duty or results from his own misconduct in a given case, does not in any way depend on the liability of the company to the soldier for damages. (C. 23666, Sept. 19, 1910.) Nor does it depend on whether the soldier was violating a military rule or regulation, but rather does it depend on the quality or condition of the act itself of the soldier.

(C. 23666, Feb. 29, 1912, citing 2 Pension Decisions, 232.)

MEDICAL ATTENDANCE: Seamen in the Army Transport Service; appropriations.

A seaman in the Army Transport Service was sent to an Army hospital ashore for temporary treatment. *Held*, that seamen in the United States Army Transport Service are entitled under their contract of employment to all the benefits which usually pertain to the service of a seaman, or which may be provided for such service by regulation, which include needful medicines and medical attendance; and when one receives treatment ashore by authority of the officers of the vessel on which he is engaged, the expenses therefor are a charge against the United States. *Held further*, that the appropriation for medical attendance and supplies under the control of the Medical Department is chargeable with the expenses of such treatment, said appropriation being more specific as to this purpose than that for the transportation of the Army to which the service is incidental.

(C. 24389, May 28, 1912.)

MILITARY ACADEMY: Reappointment of cadet under section 1325, Revised Statutes.

Where a cadet had been found deficient and recommended for discharge by the Academic Board and had as a result been discharged.

debtedness to their company commander. *Held*, that the post exchange must look to the company commander for the money due it, and that the fact that he did not pay it over could not serve to render the enlisted men liable for a second payment. The confidence of enlisted men in their superior officers should not be shaken by even the suggestion that where they have in good faith reposed confidence in such superior officer they should be told that they did so at their peril.

(C. 29656, Apr. 30, 1912.)

PRIVATE MILITARY BODY: Assuming the name of "U. S. Volunteers."

Where a private signal corps, to be maintained independently of State or national aid, asked whether there was any reason why it should not assume the title of "U. S. Volunteers." *Held*, that there was no Federal law which would prevent the use of that or any other name by such an organization; but advised that the good taste and good faith involved in the assumption of the name of an organization which clearly is not national in its character nor in any sense connected with the United States would seem questionable.

(C. 29058, May 1, 1912.)

PUBLIC PROPERTY: Donation of personal property to the United States.

Upon question being raised as to the authority of the War Department to permit abutting landowners to string additional wires on the Government fence around the military reservation of Leon Springs, Tex., to make the fence more secure for their stock, under an agreement that the wires, when so placed, should become the property of the United States. *Held*, that in the absence of a statute forbidding the acceptance of donations of personal property, such as applies to the acceptance of voluntary services or of donations of land, there is no legal objection to the permission being granted, under the proposed agreement, it appearing that such permission would be in the interests both of the Government and of the abutting landowners.

(C. 29257, Mar. 9, 1912.)

PUBLIC PROPERTY: Land boundary; commission; res judicata.

Where claim was made that a military reservation, as described in the reservation order, included land of the claimant estate, and it appeared that the matter of the boundary had been determined by a boundary commission against the contention of the claimant, the decision being affirmed on appeal by the supreme court of the Territory. *Held*, that the determination so made should be regarded as final, and that possession of the land in dispute should be retained, leaving the claimant to his remedy at law to recover possession of the land. *Held further*, that even if the question were a doubtful one, possession should be retained until the matter should be judicially determined adversely to the United States.

(C. 19852, Mar. 19, 1912.)

Held, that under Article IV, section 3, paragraph 2, of the Constitution, the Congress alone has the right to dispose of the public property, whether real or personal, and that therefore in the absence of authority from Congress the request of the American National Red Cross could not be granted. (See *U. S. v. Nicoll*, Fed. Cas. No. 15879; and 16 Op. Atty. Gen., p. 477.)
(C. 16453, May 28, 1912.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

APPROPRIATIONS: Public buildings; cost of plumbing therein.

Sundry civil appropriation act of March 4, 1909 (35 Stat., 1004), for the fiscal year 1910 provides:

“Cavalry post, Hawaii Territory: for the construction of the officers’ quarters, barracks, storehouses, etc., necessary for the accommodation of headquarters and two squadrons of cavalry, \$200,000.”

The sundry civil appropriation act for the fiscal year 1910 authorized contracts to be entered into for a greater amount than that appropriated for, but made no other changes in the conditions or terms of the appropriation.

The Army appropriation act of March 3, 1911 (36 Stat., 1051), for the fiscal year 1912, under the heading “Water and Sewers at Military Posts,” provides:

“For procuring and introducing water to buildings and premises at such military posts and stations as from their situation require it to be brought from a distance; for the purchase and repair of fire apparatus; for the disposal of sewage; for repairs to water and sewer systems and for hire of employees, \$2,250,903.27.”

Upon a request by the Secretary of War for a decision as to whether or not the appropriation for the construction of buildings at the cavalry post, Hawaii Territory, is available for the installation of plumbing fixtures therein to the exclusion of the use for the same purpose of the current appropriation for water and sewers at military posts. *Held*, that the cost of plumbing within said buildings should be paid from the appropriations made for the construction of the same and not from the appropriation for “water and sewers at military posts.”

(18 Comp. Dec., 612, Feb. 12, 1912.)

ENLISTED MEN: Continuous service; purchase of discharge.

A private served three consecutive enlistments of three years each in the Army, and enlisted for the fourth, but purchased his discharge after serving less than half his term, and enlisted in the Marine Corps. *Held*, that the time served in the uncompleted enlistment period in the Army should not be computed in making up the fourth enlistment period, on which he entered as an enlisted man of the Marine Corps.

(18 Comp. Dec., 714, Mar. 20, 1912.)

The earnings of the land-grant portion of a railroad used for Government business are to be determined on the basis of the original land-grant mileage in connection with the nonaided mileage used for said service.

(18 Comp. Dec., 674, Mar. 6, 1912.)

OFFICERS OF THE ARMY: Selection of home on retirement.

There is no law or regulation which limits the selection of the home by any Army officer on retirement from active service to a place within the continental limits of the United States, and where an officer serving in the Philippine Islands is retired and selects his home in Germany, such officer is entitled to the mileage and actual expenses which the law gives in traveling to his home when he makes the journey under proper orders within a reasonable time after the date of retirement.

(18 Comp. Dec., 634, Feb. 26, 1912.)

PAY AND ALLOWANCES: Fuel allowances; use of by family of officer.

During the entire period from September 1, 1910, to April 30, 1911, a lieutenant colonel of the Army was on duty at his permanent station in Alaska and regularly occupied two rooms assigned to him as quarters, which were heated by fuel issued by a quartermaster. At the officer's request and upon his certificate that he would use 2,000 pounds of bituminous coal and not use 10,870 pounds of bituminous coal per month during said period, there was issued to his family at Shrewsbury, N. J., 64,000 pounds of anthracite coal, for which the quartermaster paid the sum of \$187.20. The auditor disallowed this item in the accounts of the acting quartermaster, and the latter appealed to the comptroller from the auditor's decision. *Held*, that when the quarters actually occupied by an Army officer are heated at the expense of the United States he is not entitled to have any additional fuel issued to himself or to his family at the expense of the United States, notwithstanding the fact that he may not have occupied the full number of rooms to which his rank entitled him, or that the quantity of fuel used to heat the rooms which he occupied as quarters may have been less than the quantity which the regulations prescribe as the maximum quantity for the number of rooms which he occupied. *And held further*, that when an officer on duty in Alaska occupies public quarters heated at his own expense, the quantity of fuel which, under the regulations, may be issued at the expense of the United States to his family can not exceed the quantity prescribed in the regulations for the number of rooms actually occupied as quarters by said officer.

(18 Comp. Dec., 592, Feb. 8, 1912.)

A rehearing was requested upon a certificate showing that the officer occupied his full allowance of six rooms, but the rehearing was denied upon the ground that all the rooms occupied had been heated at Government expense.

MILITIA: Authority of the President to send outside of the United States.

The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government except to suppress insurrection, repel invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation.

(29 Op. Atty. Gen., 322, Feb. 17, 1912.)

OFFICERS OF THE ARMY: Appointment; commission issued in the name of a deceased person.

Capt. John T. Haines became entitled by seniority to promotion to the grade of major of cavalry March 3, 1911, was nominated to the Senate by the President on May 4, 1911, for promotion, and the nomination was confirmed May 15, 1911. He had died May 11, 1911. *Held*, that a commission as major of cavalry can not be lawfully issued in the name of an officer of the Army whose death occurred after he was nominated to that grade by the President but prior to the time the nomination was confirmed by the Senate. It is essential to the creation of such office that there should be an appointment by the President, in addition to a nomination to, and consent by, the Senate.

(29 Op. Atty. Gen., 254, Sept. 22, 1911.)

TAXATION: Philippine customs stamp tax; Government property.

Section 284 of act No. 355 of the Philippine Commission, as amended (Sec. 1660 of the Compiled Acts of the Philippine Commission of 1907), provides that certain shipping documents relating to goods imported into said islands shall not be issued, received, granted, or recognized unless there shall be attached thereto certain customs stamps, as specified in the act, of denominations of from 40 cents to \$4. Philippine currency, according to the character of the instrument, the size of the vessel, or the value of the goods involved. This stamp was demanded for the entry of certain goods belonging to the United States imported into the Philippine Islands for the use of the Army. *Held*, that the stamp is a tax and not a reimbursement for services performed, and that so far as the act in question covers goods of the United States imported into the islands, it is illegal and void as being beyond the competency of the Philippine Government.

(Op. Atty. Gen., June 8, 1912.)

WAR: Neutrality; importation of arms and ammunition; words and phrases.

The words "arms or munitions of war," within the meaning of the joint resolution of March 14, 1912, authorizing the President by proclamation to prohibit the export of arms or munitions of war to

tions stated that the dam was "backed up for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest." The specifications further stated that each bidder was expected to visit the site of the work and ascertain the nature thereof and obtain information necessary to enable him to make an intelligent proposal. After work was begun it developed that the space above the dam was occupied by the cribwork of an old dam, instead of by the material stated in the specifications. *Held*, that the cost of additional inspections for the period of delay occasioned by the extra time required for removing the cribwork of the old dam should be charged against the contractor, since the statement in the specifications of the character of the material back of the dam did not amount to a warranty, because the bidder had been invited to inspect the work before submitting his proposal.

(*Hollerbach & May v. United States*, Court of Claims, No. 29952, Feb. 12, 1912.)

INDIANS: Introducing intoxicating liquors into the country formerly comprising the Indian Territory.

Before the admission of Oklahoma as a State, the act of March 1, 1895 (28 Stat., 697), forbade the manufacture or sale in or the introduction into the Indian Territory of intoxicating liquors. General statutes forbade the introduction of any such liquors into the Indian country or the sale thereof to the Indians. The enabling act under which the State constitution of Oklahoma was formed and the State admitted into the Union provided also against the introduction of such liquors into the original limits of the Indian Territory from other points within the State, and preserved the jurisdiction of Congress over the Indians and their lands. *Held*, that the act of March 1, 1895, is still in force as a Federal statute, and a person who ships intoxicating liquors from an adjoining State into the limits of the Indian Territory, as it formerly existed, although to that portion of it where the Indian title has been extinguished, violates the provisions of said act, and the district court of the United States has jurisdiction to punish him for such violation.

(*In re Webb*, Decision of U. S. Supreme Court, June 10, 1912.)

PATENTED INVENTIONS: Use of by United States.

On June 8, 1907, the Fried Krupp Co., a corporation, organized under the laws of the German Empire, brought suit in the Supreme Court of the District of Columbia against the Chief of the Ordnance Department of the United States Army to enjoin him from manufacturing and using certain improvements in guns and gun carriages, which the complainant claimed were covered by United States patents owned by it. It was admitted that the defendant was the Chief of Ordnance of the United States Army; that field guns and gun carriages embracing the improvements in question were being manufactured and would continue to be manufactured for the use of the Ordnance Department of the United States; and that the defendant derived no profits therefrom. A demurrer to the bill was sustained and

BULLETIN 20.

BULLETIN }
No. 20. }

WAR DEPARTMENT,
WASHINGTON, *October 19, 1912.*

The following digest of opinions of the Judge Advocate General for the period from July 1 to September 30, 1912, inclusive, and digest of decisions of the Comptroller of the Treasury and opinions of the Attorney General are published for the information of the service in general.

[1931376 A—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Acting Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: Leave of: employees at the West Point, N. Y., Military Academy; laws relating to leaves of absence for employees in gun factories and arsenals.

The act of February 1, 1901 (31 Stat., 746), authorizes fifteen days of annual leave with pay, under the conditions specified therein, for "each and every employee of the navy yards, gun factories, naval stations, and arsenals of the United States," and the act of March 3, 1909 (35 Stat., 755), provide for "leave of absence not to exceed fifteen days in any one year, which leave may, in exceptional and meritorious cases, where such an employee is ill, be extended, in the discretion of the Secretary of the Navy, not to exceed fifteen days additional in any one year," for per diem employees forming part of the "clerical, drafting, inspection, and messenger force at the navy yards, naval stations, and other stations and offices under the Naval Department," *Held*, that while the statutes are very comprehensive as to certain employees of the Navy Department in respect to leave of absence, the provision for such leave to similar employees in the War Department is limited to those engaged in "gun factories" and "arsenals" mentioned in said act of February 1, 1901, and that per diem employees of the Military Academy do not come within the act and there is no authority for the allowance to them of leave of absence with pay. They can only be paid for the days they work and can not be allowed leave with pay for Saturday afternoons for the months of July, August, and September.

(2-153, July 13, 1912.)

ARMY: Organization of; detail as principal assistant to Chief of Bureau of Insular Affairs.

An officer was detailed as assistant to the Chief of the Bureau of Insular Affairs, War Department, pursuant to the provisions of the act of March 2, 1907 (34 Stat., 1162), which act provides that the provisions of section 27 of the act of February 2, 1901 (31 Stat., 755), with reference to the transfer of officers of the line to the departments of the staff for tours of service, shall apply to the vacancy created by said detail and the return of said officer to the line. *Held*, that as the detail was made pursuant to said act of March 2, 1907, which makes no mention of the length of the detail, and not under section 26 of said act of February 2, 1901, which provides for details of four years' duration, the term of the detail is not limited to four years, and that the officer so detailed did not by operation of law become a supernumerary officer of the line at the expiration of four years from the date of his detail.

(14-123.8, Aug. 13, 1912.)

ARMY: Use of officers of in the reorganization of the Panama police force.

Upon request by the Secretary of War for an opinion as to the advisability of reorganizing the police force of Panama under the supervision of officers of the Army of the United States, in view of the reported condition of police affairs in the cities of Colon and Panama. *Held*, that the President, in his discretion and without the consent of Congress, and acting under Article VII of the treaty with Panama of November 18, 1903 (33 Stat., 2234), may order such officers of the Army as he deems proper to the cities of Colon and Panama and to points within the territories and harbors adjacent thereto, to maintain order, and for this purpose to reorganize the Panama police force or take such other steps as may be necessary to carry out the purposes of the President: *Provided, however*, that such officers shall be and remain at all times solely under the authority of the United States. *Held further*, that the President may not, without the consent of Congress, detail officers of the Army to serve under the Republic of Panama for the purpose of reorganizing the police force or for any other purpose.

(92-500, Aug. 19, 1912.)

ARMY BANDS: Use of during sessions of the International Congress of Hygiene and Demography.

On application for the services of the Engineer Band and the Fort Myer Band for the XVth International Congress on Hygiene and Demography, *Held*, that while bands of the Army may be ordered to furnish music as a duty devolving upon them, the propriety of their use under any given conditions is to be determined by the military authority having power to issue the necessary orders. *Held further*, that under the act of May 11, 1908 (35 Stat., 110), Army bands or members thereof stationed in or near Washington may not supply music for hire within the District of Columbia if they come into competition with other musicians.

(8-400, Sept. 4, 1912.)

ASSOCIATIONS: Attending meetings of business associations; payment of membership dues in the International Association of Chiefs of Police.

Section 8 of the act approved June 26, 1912 (Public No. 201), appropriating for the expenses of the District of Columbia provides:

"No money appropriated by this or any other Act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation."

Upon consideration of the question as to whether or not said law operates to prevent the payment of traveling expenses of employees of the Quartermaster's Department in attending meetings of trans-continental passenger associations, tariff classification committees, associations or committees having to do with marine matters, or associations or committees in connection with heating, lighting, and sewerage problems, etc. *Held*, that the law was not intended to limit the means or methods employed by the Government in the exercise of its functions (Dec. Comp. Treas., July 20, 1912), and that associations of the character named, so far as they relate to the business of the Government, do not come within the meaning of the law, and the expenses of officers or employees of the Government in attending upon such meetings as are necessary or proper in connection with the transaction of the Government business may be paid. *Held further*, that a membership fee in the International Association of Chiefs of Police for The Adjutant General may be paid if necessary or proper in procuring information concerning probable deserters or escaped military prisoners.

(94-210, July 25, 1912.)

NOTE.—The operation of section 8 of the act of June 26, 1912, *supra*, was in part postponed by section 10 of the Sundry Civil Act of August 24, 1912 (Public No. 302), during the fiscal year 1913.

AVIATION CORPS: Flight on Labor Day without orders; line of duty.

On consideration of the question as to whether an officer detailed to the Aviation Corps, permitted but not ordered to make a flight on Labor Day, on the occasion of a celebration of the day by labor organizations, if sustaining an accident during such flight, the accident would be in the line of duty. *Held*, that it is the duty of the officer under his detail to make practice flights to fit himself for the service and to advance the science and art of aviation in its relation to the military service, and that the fact that the particular flight is not ordered but only permitted, or that it is made on the occasion of the labor celebration, should not be regarded as taking the officer out of the line of duty.

(54-020, July 24, 1912.)

CERTIFICATE OF MERIT: Time of making recommendation therefor; pay under subsequent enlistment.

A soldier performed an act of meritorious service for which the captain of his company recommended that he be granted a certificate

WAR DEPARTMENT: Filling clerical positions therein; act of August 23, 1912.

The Legislative, Executive, and Judicial Appropriation Act of August 23, 1912 (Public No. 299, p. 29), provides that

“During the fiscal year 1913 no vacancy occurring in the classified service of the War Department herein provided for shall be filled except by promotion or demotion from among those within said service, until the whole number of those herein authorized in said classified service of the Department shall have been reduced not less than five per centum.”

On application for a construction of this provision by the Secretary of War. *Held*, 1. That the places in the classified service provided for in said act in the Signal Office, Office of the Chief of Ordnance, Office of the Chief of Engineers, and in the Division of Militia Affairs, to be paid from appropriations for special purposes not carried in said act, are a part of the departmental establishment at Washington and come within the provision quoted above; 2. That the intent of the statute appears to be that during the fiscal year 1913 no vacancies shall be filled except in accordance with its provisions and that therefore vacancies existing at the time the act went into effect should not be filled except as therein provided; 3. That all vacancies occurring during the fiscal year 1913 in the classified service of the War Department until the five per cent reduction has been accomplished must be filled from among those within said service and can not be filled by promotion or demotion of employees from the field service and their transfer to the bureaus in Washington, as the act relates exclusively to the classified service in the departmental establishment at the seat of government.

(Compt. R. J. Tracewell, Aug. 28, 1912, reaffirmed on rehearing Sept. 7, 1912.)

OPINIONS OF THE ATTORNEY GENERAL.

(Digests prepared in the office of the Judge Advocate General.)

EIGHT-HOUR LAW: Employment of laborers and mechanics in making repairs to Government vessels.

The act of August 1, 1892 (27 Stat., 340), limits and restricts the service and employment of all laborers and mechanics who may be employed by any contractor or subcontractor “upon any of the public works of the United States” to eight hours in any one calendar day. Upon request for an opinion as to whether said law is applicable to contracts for repairs to certain vessels owned by the Government. *Held*, that the employment of laborers and mechanics in making repairs to Government vessels is employment upon a public work of the United States, and is therefore subject to the restrictions of the eight-hour law of August 1, 1892.

(29 Op. Atty. Gen., 395, May 10, 1912.)

EIGHT-HOUR LAW: Purchase of ammunition.

The Fortification Act of June 6, 1912 (Public No. 183), contains the proviso that—

“Except in time of war or when, in the judgment of the President, war is imminent, no part of this or of any other sum in this act for

by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, Bureau, officer, or any civil, military, or naval commission whatever. * * *

The portion of the section not quoted prescribes penalties against those violating the preceding portion of said section.

On application for opinion as to the status of a retired officer of the Marine Corps with relation to said section. *Held*, that an officer of the United States Army or of the Marine Corps, retired from active service, and not wholly retired, is an officer in the employment of the Government and is within the prohibition of said section of the Revised Statutes.

(29 Op. Atty. Gen. 397, May 17, 1912.)

RETIREMENT: Retired naval officer holding appointment under the Civil Service Commission; two offices.

Section 2 of the act of July 31, 1894 (28 Stat., 205), provides that no person who holds an office under the United States, the salary or annual compensation attached to which amounts to \$2,500 or more, shall be appointed to or hold any other office to which compensation is attached, with certain exceptions, without special legislative authority. *Held*, that a commander of the United States Navy, retired, holds an office with a salary or compensation attached within the meaning of the above enactment, and as he is in receipt of a salary as such retired officer amounting to \$2,500 per annum, he can not be appointed a clerk of Class III under the Civil Service Commission, that position being also an office within the meaning of said statute with compensation attached (*United States v. Hartwell*, 6 Wall., 385).

(Op. Atty. Gen., Aug. 12, 1912.)

BULLETIN 22.

BULLETIN }
No. 22. }

WAR DEPARTMENT,
WASHINGTON, *November 21, 1912.*

The following opinions of the Judge Advocate General, having special reference to the Army appropriation act of August 24, 1912 (37 Stat., 569-594), are published for the information of the service in general.

[1974650, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

[First Indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
September 16, 1912.

To the CHIEF OF STAFF.

I have had under consideration your memorandum of the 9th instant, requesting the opinion of this office on certain questions arising in the administration of the following provisions of the act of Congress of August 24, 1912, and of the joint resolution of Congress of the same date respecting the detached service of officers of the Army:

“Provided, That hereafter in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such troop, battery, or company for duty of any kind; and all pay and allowances shall be forfeited by any superior for any period during which, by his order or his permission or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso; but nothing in this proviso shall be held to apply in the case of any officer for such period as shall be actually necessary for him, after having been relieved from detached

service, to join the troop, battery, or company to which he shall belong in that branch in which he shall hold a permanent commission, nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty in the Judge Advocate General's Department or in the Ordnance Department or in connection with the construction of the Panama Canal until after such canal shall have been formally opened, or in the Philippine Constabulary until the first day of January, nineteen hundred and fourteen, or to any officer detailed, or who may be hereafter detailed, for aviation duty. And hereafter no officer holding a permanent commission in the Army with rank below that of major shall be detailed as assistant to the Chief of the Bureau of Insular Affairs with rank of colonel, or as commanding officer of the Porto Rico Regiment of Infantry, or as chief or assistant chief (director or assistant director) of the Philippine Constabulary, and no other officers of the Army shall hereafter be detailed for duty with the said constabulary except as specifically provided by law." (Act of Aug. 24, 1912.)

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in the 'act making appropriation for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes,' there be substituted for the word 'hereafter' where it first occurs in the first proviso under the heading, 'Pay of officers of the line,' the words 'on and after December fifteenth, nineteen hundred and twelve.'" (Joint resolution of Congress, August 24, 1912.)

I understand your inquiries to be as follows:

1. Does the date fixed in the joint resolution, viz, December 15, 1912, mark the date on which the penalty clause of the proviso will commence to apply, so that all changes in stations of officers must be accomplished on or before that date, or is a reasonable time given after that date to accomplish such change?

2. Is the language of the proviso, "actually present for duty for at least two of the last preceding six years with the troop, battery, or company of that branch of the Army in which he shall hold said commission," to be interpreted literally as meaning that an officer must be actually present *on* duty with a troop, battery, or company, or can it be fairly interpreted as meaning that he must be present and available *for* duty with a troop, battery, or company?

More specifically, and included within the scope of this inquiry, you ask:

3. Is an officer to be considered as actually present for duty with a troop, battery, or company, or detached therefrom, within the sense of the proviso, when ordered to the following descriptions of duty: To another post to take examination for promotion; to the Philippine Islands, even if he is due to be transferred on account of foreign service; on court-martial duty at another post as member, witness, judge advocate, or counsel; to make the annual militia inspections; for militia duty at camps of instruction; for duty as umpire or observer at maneuvers; as range officer or competitor at competitions; for reconnoissance or map work; to supervise elections; as member of any board or commission at a post other than his own; to conduct prisoners; for duty as regimental or battalion

Col. J. H. Dorst, Third Cavalry, says:

"It will be noticed that all troops but one were commanded by lieutenants—5 of them second lieutenants—and that of the 22 officers present 16 were lieutenants. The officers are habitually insufficient in number to do all their required work well. Necessarily many things are slurred. Many delays, omissions, and errors are overlooked or condoned because it is known that the officers have not the time to give the matters in question their personal attention without neglecting something else, and can not justly be held responsible for what seem to be neglects. A low standard inevitably becomes established by and by, and is accepted as the correct standard by the younger officers." (P. 43.)

Col. F. K. Ward, Seventh Cavalry, says:

"It is impossible, with so many officers absent, to put the regiment in the condition it should be as regards efficiency. The discipline and instruction, in fact everything that contributes to efficiency, is unavoidably affected injuriously. Many troops have but one officer present, and one is not enough for thorough instruction. Frequent changes of troop commanders are unavoidable. Much of the instruction has to be by officers temporarily attached, because the one officer present is on other duty. The statement can not be made too emphatic that discipline, instruction, contentment of the enlisted men, in fact everything which contributes to efficiency, is now injuriously affected by the absentee list." (P. 47.)

Col. George A. Dodd, Twelfth Cavalry, says:

"Some of the effects of absenteeism and frequent changes of organization commanders are:

"First. A spirit of discontent on the part of enlisted men and a dislike on their part of being commanded by officers entirely inexperienced in the practical performance of military duties. Each captain, or troop commander, if he is with his troop long enough, should have a system of his own so far as the internal management of his troop is concerned—an official individuality or equation which is imparted not only to the soldiers but to officers under him. It is that which holds an organization together, imparting to it an individual pride which is essential to good results. The numerous and frequent changes of troop commanding officers, as indicated below, destroys all this, thereby weakening discipline. Old soldiers have been known to openly declare on being discharged that they would reenlist were it possible to know who they were to serve under." (P. 52.)

Brig. Gen. Arthur Murray, Chief of Coast Artillery, says:

"A mortar or gun battery or a mine field absolutely requires a certain number of officers for its proper service. These officers can not be dispensed with without a drop in efficiency. Their duties can not be doubled up and performed by a less number of individuals, no matter how proficient the latter may be. Their several stations are separated, and the duties pertaining to each position are all that one man can attend to at the time.

* * * * *

"Every effort has been made to decrease the number of officers of Coast Artillery detached from companies. Staff positions have been doubled up, leaves of absence have been cut down or refused,

The suggestion has been made to me that it would be competent to read into the proviso an exception as to any detached duty which, under the customs of the service or the usual practice of military administration, would not require a formal order of detachment from a troop, battery, or company, such as absence undergoing examination for promotion, on duty as member of boards, courts, or commissions, or on minor duties directed to be performed by post or regimental commanders, such as map making, etc. In construing the phrase "actually present for duty" I have not been able to regard the kind of order which creates or destroys the duty status or the grade of authority that issues such orders as a material fact. Neither do I think it is material in determining whether any kind of "detachment" comes within the terms of the proviso. The law regards substance, not form. The mere fact that a formal order is not required or is not issued or does not denominate such duty as detached duty, or does not in terms order a detachment of any kind, can not conclude the facts in the case or serve to qualify the force of the words of the proviso "duty of any kind"; nor can I see how, under the terms of the statute, the duration of the duty, whether transitory or temporary or for the longer and usually more or less definite periods, can serve to extinguish its character as "duty of any kind." All absences of an officer from his organization for duty of any kind are within the terms of the proviso.

In the light of what is stated above I answer your second inquiry as follows: The use of the word "actually" in connection with the phrase "present for duty" requires that the phrase should be construed literally—that is, that the officer should be present *on* duty with one of the organizations prescribed, in the sense that he is *in a regular and normal duty status* with respect thereto, although it may at times be impracticable for him actually to perform every duty normally pertaining to the status—and, therefore, as excluding an officer who, although physically present at the post or station where his troop, battery, or company is serving, is separated from duty therewith by an order assigning him to other duties, notwithstanding he may be available *for* such duty in the sense that an order from his immediate commander would restore him to such duty.

Applying the conclusions I have reached to your third and fourth inquiries, I answer as follows:

(a) That an officer of company grade under compliance with orders to perform any of the descriptions of duty mentioned in said inquiries is not to be considered as actually present for duty with a troop, battery, or company; provided, always, that the order assigning him to such duties operates to relieve him from the performance of duty with his proper organization; excepting the officer who commands a detached portion of his troop, battery, or company, who must under those conditions be held, I think, to be actually present for duty with his organization.

(b) That an officer of company grade who is sick in quarters, or in hospital at his post or elsewhere, or in quarantine at the station where his organization is on duty or elsewhere, or in compliance with summons from a civil or military court, or in arrest, or undergoing trial, or traveling in compliance with orders to change station from one company assignment to another, or absent with leave, though not "actually present for duty" with his organization, is not to be con-

thereto, in order to avoid what was conceived to be greater inconveniences with resulting greater detriment to the service incident to the continuance of a system under which officers may pass through the company grade with insufficient service with their organizations.

E. H. CROWDER,
Judge Advocate General.

[Fourth indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
October 14, 1912.

To the CHIEF OF STAFF.

1. In the foregoing letter, dated September 4, 1912, Capt. Mark L. Ireland, Coast Artillery Corps, after referring to the recent legislation respecting detached service, states, *inter alia*, that he was detailed for duty in the Ordnance Department from July 1, 1906, to October 5, 1909; that on October 9, 1909, he complied with paragraph 13, S. O. No. 196, War Department, 1909, directing him to report to the commanding officer of the Artillery District of the Columbia, for staff duty; that from about February 10 to September 2, 1910, he was attached to the One hundred and sixtieth Company, Coast Artillery Corps, under orders from the Artillery district commander; that he performed duty with the One hundred and sixtieth Company during the entire period of his attachment thereto, except from July 25 to August 24, 1910, during which period he was detached for duty as an umpire at the camp of instruction at American Lake, Wash.; that he was in command of said company from March 19 to April 26, 1910; that he is at present on duty as a student officer at the Coast Artillery School, Fort Monroe, Va.; and that if his "Ordnance service is not counted and credit is given for the company duty performed with the One hundred and sixtieth Company, Coast Artillery Corps," his status is such as to permit him to complete the advanced course in the Coast Artillery School.

2. The legislation referred to above is found in the Army appropriation act of August 24, 1912 (37 Stat., 571), as amended by a joint resolution of August 24, 1912 (37 Stat., 645), and, in so far as material to the present inquiry, reads as follows:

(1) "*Provided*, That on and after December fifteenth, nineteen hundred and twelve, in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company of that branch of the Army in which he shall hold said commission such officer shall not be detached nor permitted to remain detached from such troop, battery, or company for duty of any kind;

(2) "and all pay and allowances shall be forfeited by any superior for any period during which, by his order, or his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso;

(3) "but nothing in this proviso shall be held to apply in the case of any officer for such period as shall be actually necessary for him,

tached-service station to the station of his organization or while detailed for duty in the Ordnance Department or for any other duty specified in the fourth clause. The blotting out of the provision when the assignment of an officer to any duty described in the third or fourth clause or his continuation on such duty is in question meets every requirement of the language employed in those clauses. On the other hand, to hold that the third and fourth clauses have the effect of changing constructively the character of the duty therein mentioned so that such duty may be counted as duty "with a troop, battery, or company," or to hold that those clauses warrant disregarding or treating as nonexistent any time devoted to the duties described therein, to the end that any period of troop, battery, or company service not within the last preceding six years may be counted in determining general eligibility for detached service, would be to read into the clauses a meaning that the language employed does not import, and would be inconsistent with the requirement of the first clause, which makes actual presence for duty "with a troop, battery, or company" for a specified portion of the last preceding six years the test of general eligibility for detached service.

6. For the reasons stated, I am of the opinion that a captain or lieutenant of the line who serves under detail in the Ordnance Department thereby accumulates ineligibility for detached service in general; that in determining Capt. Ireland's eligibility to remain on duty as a student officer at the Coast Artillery School on and after December 15, 1912, and therefore away from a company of the Coast Artillery Corps for duty not of the kind specified in the third and fourth clauses of the detached-service provision of the act of August 24, 1912, the period of his service in the Ordnance Department within the last preceding six years must be taken into account, and that such service may not be treated as service with a company of the branch in which he is commissioned.

7. With reference to the second question raised by Capt. Ireland the following extract from an earlier opinion in which this office discussed at length the detached-service provision here under consideration is in point, viz:

"* * * In determining when officers who have been withdrawn from the performance of normal duty with a troop, battery, or company, including those so withdrawn by the orders of their immediate regimental or post commanders, may be treated as again 'actually present for duty' with a troop, battery, or company, the true rule is that when such an officer shall resume, pursuant to competent orders, such an actual relation to a company as will make him available without further orders to perform the usual duties of his grade with respect to said company, with the primary purpose of performing them, and therefore stands able and ready to perform them as they arise in the course of military administration, he is 'actually present for duty' with a troop, battery, or company within the meaning of the statute; and that anything short of this would be only a constructive presence and not a compliance with the proviso. If an officer is not thus present for duty with a troop, battery, or company then he is not actually present within the terms or intendment of the proviso if its words are not to be forced out of their evident meaning. I may add that I find nothing in the law which prevents

serve, which, as already constituted, is not organized; and as already constituted there is no provision for the men so enlisted to be attached to any particular organization of the Regular Army. I am therefore of opinion that the men who reenlist or enlist in the Army Reserve form a class different from the furloughed soldiers in that they are not regarded as in any sense belonging to any organization, but simply to the unorganized Army Reserve. I am further of opinion that the term "furloughed soldiers" in the seventh proviso refers only to those whose enlistments have not yet expired—that is, to those who have been furloughed and transferred to the Reserve as authorized in the second and fourth provisos, and does not include those who have reenlisted or enlisted in the Army Reserve; but the effect of the following provisions, namely, "and any enlisted man who shall have reenlisted in the Army Reserve shall receive during such service the additional pay now provided by law for the soldiers of his arm of the service in their second enlistment period. Upon reporting for duty and being found physically fit for service, they shall receive a sum equal to \$5 a month for each month during which they shall have belonged to the Reserve, as well as the actual cost of transportation and subsistence from their homes to the places at which they may be ordered to report for duty under such summons," is to indicate that not only "furloughed soldiers who belong to the Reserve" but also those who shall have "reenlisted" or "enlisted" in the Reserve are to be subject to be summoned by the President for active duty "in the event of actual or threatened hostilities * * * when so authorized by Congress," and that when so summoned all will be under like obligation to report and serve in obedience to the summons.

5. In support of these views it may be observed that the seventh proviso appears to distinguish between soldiers covered by the term "all furloughed soldiers who belong to the Army Reserve" and those who have reenlisted "in the Army Reserve," in that the former "during the continuance of their service with such organizations * * * shall receive the pay and allowances authorized by law for soldiers serving therein," and that the latter "shall receive during such service the additional pay now provided by law for the soldiers of his arm of the service in their second enlistment period." While, therefore, the term "furloughed soldiers" appears to be limited to those who have been furloughed to the Reserve, without discharge, after three or four years' service, the provision respecting those who have "reenlisted in the Army Reserve," that they shall receive "*during such service* the additional pay now provided by law for the soldiers in his arm of the service in their second enlistment period," together with the concluding sentence providing for a bounty for members of the Reserve when reporting for duty "*under such summons*," clearly indicates a legislative intent that not only furloughed soldiers but *all* the members of the Army Reserve as well should be liable to be summoned under similar conditions. It may be further added that, while the statutory provision for summoning the Reserves is not very definite and complete, the summoning of the Reserves depends upon future authority from Congress, and such authority, when given, will include all the necessary incident powers to make the Reserve an effective body.

and no details to fill vacancies in the grade of major in the Quartermaster Corps shall be made until the number of officers of that grade shall have been reduced by nine, and thereafter the number of officers in said grade shall not exceed forty-eight; and no details to fill vacancies in the grade of captain in the Quartermaster Corps shall be made until after the number of officers of that grade shall be reduced by twenty-nine, and thereafter the number of officers of said grade shall not exceed one hundred and two; and whenever the separation of a line officer of any grade and arm from the Quartermaster Corps shall create therein a vacancy that, under the terms of this proviso, can not be filled by detail, such separation shall operate to make a permanent reduction of one in the total number of officers of said grade and arm in the line of the Army as soon as such reduction can be made without depriving any officer of his commission:
 * * * *And provided further,* That for the purpose of carrying into effect the provisions of this section the President is hereby authorized to appoint, by and with the advice and consent of the Senate, the Chief of the Quartermaster Corps herein provided for immediately upon the passage of this act, and it shall be the duty of the said chief, under the direction of the President and the Secretary of War, to put into effect the provisions of this section not less than sixty days after the passage of this act."

3. From the foregoing it appears that ultimately the authorized commissioned strength of the Quartermaster Corps in the grades from colonel to captain, both inclusive, is to equal the aggregate commissioned strength heretofore authorized in those grades for the Quartermaster's, Subsistence, and Pay Departments, less the following reductions, viz: Two colonels, 2 lieutenant colonels, 8 majors, and 28 captains; and that these reductions are to be effected by the cessation of details—details of the class made pursuant to the provisions of sections 26 and 27 of the act of February 2, 1901.

4. Concerning section 3 of the act of August 24, 1912, this office, under date of September 3, 1912, in an opinion which received the approval of the Acting Secretary of War, remarked, in part, as follows:

"In determining the point of time at which each of the several provisions of the section became or may become effective, a distinction is to be observed between provisions of a nature to become effective by mere operation of law and those which require affirmative executive or administrative action to give them effect. Provisions falling in the first class became effective immediately upon the approval of the act, while those of the second class may not be placed in operation until 60 days after the approval of the act, except in so far as the final proviso of the section requires or authorizes executive action prior to the expiration of the 60-day period. * * *" (64-250.)

In the same opinion the proviso requiring the temporary cessation of details in order to effect the reductions mentioned above was discussed in the following terms:

"* * * While it is true that the occurrence of vacancies might be hastened by executive action, the number of vacancies necessary to effect the prescribed reduction is bound to develop in the course of time by reason of expirations of the statutory term of service under detail in a staff corps or department, retirements by operation

Quartermaster Corps no detail, either to the old department or to the new corps, can be made until the required reductions shall have been accomplished. The result is that the officer so relieved becomes a supernumerary officer in the branch and grade in which he is commissioned; and under the terms of the last sentence of section 27 of the act of February 2, 1901, promotions to that grade and branch must cease until the number of officers therein has been reduced to the number authorized by law. As the prohibition against making details became effective on August 24, 1912, the concluding provision of section 27 of the act of February 2, 1901, became automatically operative at the same time in respect of all cases arising through the relief of officers who have been under detail in one of the three departments merged into the new corps and who can not be replaced by means of new details until the prescribed reductions shall have been effected.

8. By way of specific answer to the question presented in the memorandum referred to in paragraph 1 hereof, I have to say that in my opinion that part of section 3 of the act of August 24, 1912, which requires the absorption of a certain number of officers rendered surplus by the merging of the Quartermaster's, Subsistence, and Pay Departments into the Quartermaster Corps became effective on the date of the approval of the act—that is, on August 24, 1912.

E. H. CROWDER,
Judge Advocate General.

[Second indorsement.]

WAR DEPARTMENT,
JUDGE ADVOCATE GENERAL'S OFFICE,
October 16, 1912.

TO THE ADJUTANT GENERAL:

1. In the foregoing letter, dated October 10, 1912, the Chief of the Quartermaster Corps requests information "As to the proper procedure in filling vacancies in the position of quartermaster sergeant after November 1, the date fixed for the consolidation of the Quartermaster's, Subsistence, and Pay Departments to become effective."

2. The consolidation thus referred to is prescribed by section 3 of the Army appropriation act of August 24, 1912 (Public, No. 338). That section, in so far as it is material to the present inquiry, reads as follows:

"That the office establishments of the Quartermaster General, the Commissary General, and the Paymaster General of the Army are hereby consolidated and shall hereafter constitute a single bureau of the War Department, which shall be known as the Quartermaster Corps, and of which the Chief of the Quartermaster Corps created by this act shall be the head. The Quartermaster's, Subsistence, and Pay Departments of the Army are hereby consolidated into and shall hereafter be known as the Quartermaster Corps of the Army.

* * * The noncommissioned officers now known as post quartermaster sergeants and post commissary sergeants shall hereafter be known as quartermaster sergeants; * * * and each of said non-commissioned officers * * * shall continue to have the pay, allowances, rights, and privileges now allowed him by law: * * *

General Staff Corps, analogous in all respects to that of similar previous legislation in the case of the Chief of Coast Artillery, the reasoning advanced in the above discussion in the case of the latter officer is equally applicable and controlling in considering the relation of the Chief of the Militia Division to the General Staff Corps. So, too, in considering the question as respects both officers, I can not disregard the fact, which strengthens both cases, that Congress eight years after having made the Chief of Coast Artillery, as such, an additional member of the General Staff Corps created and for similar reasons another additional member of that corps by virtue of his office, which fact, coupled with the presumption in favor of the continuance of a relation once legislatively established, furnishes strong assurance in both cases of a fixed legislative intention and policy.

11. I am satisfied, in view of the reasons hereinbefore advanced, that by fair construction some office and function can be assigned to the statutes providing that the two officers in question shall be additional members of the General Staff Corps, as well as to the recent section in question prescribing the constitution of said corps, without derogation from any of them. The purpose of the former I have already sufficiently indicated, and the purpose of the latter is, by reducing the detailed members of the General Staff Corps, to render the officers thus relieved available for service where, as Congress deemed, they will be of greater use. Under such circumstances all the statutes must stand.

12. I therefore conclude that the provisions of section 5 of the act approved August 24, 1912, making appropriations for the support of the Army for the present fiscal year, do not affect the relations of the Chief of Coast Artillery and the Chief of the Division of Militia Affairs to the General Staff Corps, and that each of these functionaries still is, by virtue of his office, an additional member of that corps. The question submitted is answered accordingly.

E. H. CROWDER,
Judge Advocate General.

Upon reporting for duty, and being found physically fit for service, they shall receive a sum equal to five dollars per month for each month during which they shall have belonged to the Reserve, as well as the actual cost of transportation and subsistence from their homes to the places at which they may be ordered to report for duty under such summons."

Held, (1) That the fourth proviso in section 2 of the act of August 24, 1912, *supra*, is to be regarded as only a partial definition of the "Army Reserve," and that the section as a whole indicates that the Army Reserve includes, along with soldiers furloughed at the end of four years, soldiers furloughed on their own applications at the end of three years, together with men who reenlist or enlist in the Army Reserve as authorized in said section;

(2) That the men who enlist or reenlist in the Army Reserve form a class different from the Army Reserve composed of furloughed soldiers only in respect of the fact that the former do not enter the Reserve by way of furlough from particular organizations, and that the provision for their pay when summoned for active duty is somewhat different from that of soldiers furloughed to the Army Reserve, but that all members of the Reserve are under the same obligation to report for service when summoned by the President, in the event of actual or threatened hostilities, when so authorized by Congress.

(34-050, J. A. G., Oct. 1, 1912.)

ARMY RESERVE: Right to vote; amenability to trial by courts-martial.

With reference to the following questions, viz:

"(1) Do members of the Army Reserve who return to their legal residences have a right to vote in those States that by their constitution deny this right to members of the U. S. Army or Navy?"

"(2) Are members of the Army Reserve amenable to trial by court-martial for any military offenses committed by them while in Reserve and not recalled to the colors?"

Held, that as soldiers furloughed to, or enlisted or reenlisted in, the Army Reserve established by section 2 of the act of August 24, 1912 (37 Stat., 590), belong to and constitute part of the Army of the United States, even though they have not been summoned for active service, the first question should be answered in the negative and the second in the affirmative.

(86-220, J. A. G., Nov. 26, 1912.)

CLERKS AND EMPLOYEES: Civil service; removal of a person in the classified service on written charges.

Charges of turning in defective work and violating the rules were made against a seamstress at a quartermaster depot, to which she made reply. The Chief of the Quartermaster Corps having decided that the evidence was not sufficient to warrant a discharge, the papers were again submitted with additional affidavits supporting the charges and findings of the depot council that her discharge should be recommended. Section 6 of the act of August 24, 1912 (37 Stat.,

CLERKS AND EMPLOYEES: Transfer and payment of from lump-sum appropriation.

It was proposed to transfer a clerk at \$1,200 from the office of the Chief of Engineers, War Department, to the Engineer Department at Large and pay him a salary of \$1,500 from lump-sum appropriations, the clerk to be stationed at Washington, D. C., and his duties to be essentially different from those he was already performing. Section 7 of the general deficiency act of August 26, 1912 (37 Stat., 626), provides, *inter alia*:

"Nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation, a rate of compensation greater than such specific salary."

Held, that the proposed transfer and appointment would, in effect, be a transfer at the salary now received and an advance in compensation in violation of said act, and that the same could not lawfully be made. 19 Comp. Dec., 163.

(5-075, J. A. G., Nov. 9, 1912.)

CLOTHING ALLOWANCE: Change of initial allowance during enlistment.

A soldier enlisted May 12, 1912, for three years and was credited with the initial allowance for clothing in force at the time. In estimating this initial allowance the value of an overcoat was taken into consideration. On July 1, 1912, the issue of overcoats as a part of a soldier's clothing allowance was discontinued, and such articles were thereafter issued on company and detachment commanders' receipts for the use of the soldiers. The initial allowance was at the same time reduced. This soldier did not draw an overcoat and one was issued for his use. Paragraph 1176, Army Regulations, 1910, provides that the initial allowance for clothing is not considered as earned until the soldier has been in service for six months.

Held, that this soldier should be credited on his initial clothing allowance at the rate in force at the time of his enlistment, and that such credit should remain notwithstanding the initial allowance was subsequently reduced before the expiration of the six months' period. C. 27637.

(72-420, J. A. G., Nov. 25, 1912.)

CLOTHING ALLOWANCE: Title to clothing issued to soldier while in the service and that retained by him after discharge.

The law provides that the President shall prescribe the quantity and kind of clothing which shall annually be issued to the troops of the United States (sec. 1296, Rev. Stat.) and this is done by the issue of tables from time to time showing the articles which shall be issued and the values thereof. When the soldier is discharged from the service his clothing account is adjusted pursuant to sections 1302 and 1308, Revised Statutes, and he is charged in cash with the value of the clothing overdrawn and paid in cash the difference in value between the amount allowed and the amount drawn.

statute; that the changes in the status and stations of officers necessary to meet the requirements of the proviso must be ordered so as to become effective on or before December 15, 1912; and that on and after that date the penalty clause of the proviso will be operative against any officer responsible for its nonenforcement.

(6-124, J. A. G., Sept. 16, 1912.)

DETACHED SERVICE: Duty status; detail as professor of military science and tactics, and assumption of active duty while on leave of absence.

Section 1225, Revised Statutes, provides that—

“The President may, upon the application of any established college or university within the United States, having capacity to educate, at the same time, not less than one hundred and fifty male students, detail an officer of the Army to act as president, superintendent, or professor thereof; * * *.”

Said section was amended by the act of November 3, 1893 (28 Stat., 7), which provided that—

“No officer shall be thus detailed who has not had five years’ service in the Army and no detail to such duty shall extend for more than four years.”

An officer who had not had sufficient commissioned service to render him available for detail as professor of military science and tactics under the provisions of said section, as amended, applied for leave with permission to report to the president of the university to which he sought to be detailed as soon as the position should become vacant, and with the purpose of performing the duties thereof while on leave, and of entering upon the duties of the position under a regular detail thereto, after the expiration of his leave when he would have had sufficient commissioned service to permit his detail. *Held*, that when an officer on leave enters upon the actual performance of military duties, with the permission of the War Department, he thereby relinquishes his leave and enters upon a duty status, and that to permit a leave to be taken for this purpose would be to grant permission to do by indirection what could not lawfully be done directly. *Advised*, therefore, that the leave requested for the purpose expressed, and the permission requested in connection therewith, be not granted.

(2-100, J. A. G., Nov. 25, 1912.)

DETACHED SERVICE: Duty status; mine planter; status of an officer commanding same with respect to his being actually present for duty with his company.

A mine planter exists for the purpose of giving expert instruction in mine service. The command consists of a commanding officer assigned thereto by the War Department, a detachment of men chosen from one or more companies for their aptitude and efficiency in the duties required of them, a crew of civilian employees, the vessel, and the matériel. The duty of such command is to render expert or special instruction in mine service to the various Coast Artillery commands which it may visit in the several Artillery districts as required by orders. The command of a mine planter serv-

On April 15, 1861, the President called forth, for three months, 75,000 of the militia of the several States. May 1, 1861, may be presumed to be the date when Pennsylvania's quota reported at the rendezvous. It appears that the number so reporting exceeded the quota, that the governor retained the excess and organized them into additional companies, and that this soldier "joined" one of such companies on that date. On May 15, 1861, the State provided by law for the organization of a reserve corps composed of these additional companies, the members of which were required to be enlisted in the service of the State for a period not to exceed three years or during the war, unless sooner discharged, and were liable to be called into the service of the United States. The soldier with others of his company went into camp of instruction at Camp Wright, Pa., on June 15, 1861, and was sworn and mustered into the service of the State June 21 following. The corps as organized was tendered to the General Government but was refused for the reason, among others, that the governor insisted upon the acceptance of the whole corps with its major general and staff officers. Finally, in response to a request from the Secretary of War dated July 13, 1861, the company on July 21, 1861, left the camp to which it had been ordered by the State authorities and proceeded to Washington, D. C., where it arrived on July 23, and was mustered into the United States service as stated. Under these conditions it is *held*—

1. That where the rolls of a company are conflicting as to date of a soldier's enrollment, the circumstances attending the enrollment of the organization to which he belonged, including the date when he was taken up by the United States for payment, will be taken into consideration in determining the true date of enrollment.

2. Where, during the Civil War, forces were raised by the State for its own purposes and for the additional purpose of meeting calls from the Federal Government should they be made, such forces, if subsequently called for and accepted by the United States, should be regarded as having been enrolled for the United States service from the date when they proceeded to comply with the call.

3. That the soldier in this case should be regarded as enrolled for the United States service from July 21, 1861, inclusive, when his company proceeded to comply with the call of the Secretary of War of July 13, 1861, from which date inclusive the soldier was paid by the United States.

(98-111, J. A. G., Nov. 12, 1912.)

FORAGE ALLOWANCE: For extra horse for officer while attending riding school abroad.

A second lieutenant who had been detailed to take a course of instruction for one year at the Imperial Riding School in Germany, requested to be allowed to draw forage and other allowances for three mounts, he having been required to express his intention of providing himself with three serviceable mounts prior to his being ordered to said station. *Held*, that under existing law forage can not be allowed for more than two mounts in this case, being the number for which forage can be issued as prescribed by section 8 of the act of June 18, 1878 (20 Stat., 150).

(72-351, J. A. G., Nov. 16, 1912.)

Section 4 prescribes as a restriction on "private stations" that no such station "shall use a transmitting wave length exceeding two hundred meters, or a transformer input exceeding one kilowatt, except by special authority of the Secretary of Commerce and Labor contained in the license of the station."

The radio sets supplied to the militia by the War Department have a wave length of about 600 meters, and it is desired to install a permanent station for the signal corps of the Ohio State militia with power in excess of one kilowatt. *Held*, having in view the powers vested in Congress over the militia of the States and the legislation of Congress relating to that subject, that radio stations for the instruction of the militia should not be regarded as "private stations," but as stations operated "on behalf of the Government of the United States" within the meaning of the proviso to section 1 of said act.

(58-950, J. A. G., Oct. 12, 1912.)

MOUNTED SERVICE: Supplying mounts to officers below the grade of major while serving abroad on duty requiring mounts.

Two captains of Coast Artillery were serving under assignment with French regiments which required that officers serving therewith should be mounted, and the question arose as to whether mounts might not lawfully be provided for them while under such assignment. It was not deemed advisable by the Government to transport the mounts provided by these officers to the places where they were serving.

By the act of May 11, 1908 (35 Stat., 108), the United States engages to furnish mounts to all officers below the grade of major required to be mounted, but it is provided that if such officers furnish their own mounts they shall receive additional pay. The act of August 24, 1912 (37 Stat., 581), also provides for the purchase of horses "for remounts of officers entitled to public mounts," with the proviso that the number of horses purchased, with the number on hand, "shall be limited to the actual needs of the mounted service."

Held, that under the conditions here stated the Government might lawfully provide mounts for the officers in question if their duties required them to be mounted.

(94-011, J. A. G., Dec. 21, 1912.)

NEGOTIABLE INSTRUMENTS: Payment of stolen check when indorsed in blank and in the hands of an innocent purchaser.

An officer's official pay check was indorsed in blank and delivered to another officer in payment of an account, and without further indorsement was stolen and subsequently discounted by an innocent purchaser. *Held*, that the check so indorsed became available for transfer by anyone into whose hands it might fall, and that an innocent purchaser taking the paper in good faith in the ordinary course of business would obtain a good title thereto, notwithstanding it might have been stolen from the real owner.

(52-011, J. A. G., Oct. 5, 1912.)

such officers of the Quartermaster Corps as the Secretary of War may designate for that purpose. *Held*, that the consolidation of said departments into a single corps and the changing of the designation of said sergeants to that of quartermaster sergeant did not repeal the requirements regarding the appointment of said sergeants, respectively, and that in filling the position of quartermaster sergeant in the consolidated corps the requirements of both of said statutes with respect to the qualifications and methods of selection should be observed, adopting the higher qualifications and observing the more restricted field of selection when the two statutes contain different provisions upon the subject.

(6-224, J. A. G., Oct. 16, 1912.)

TRAVEL ALLOWANCES: To discharged soldiers; commutation of subsistence to place of enlistment; through transportation.

The Army appropriation act of August 24, 1912 (37 Stat., 576), provides "for travel allowance to enlisted men on discharge," adding the proviso that—

"Hereafter when an enlisted man is discharged from the service, except by way of punishment for an offense, he shall be entitled to transportation in kind and subsistence, from the place of his discharge to the place of his enlistment, or to such other place within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to place of enlistment."

Held, that the Government is not limited to furnishing subsistence in kind but may commute the same at the rate of three meals for each 24 hours' travel at a certain rate per meal (Dec. Comp. of the Treas., Oct. 12, 1912). *Held further*, that the Government is bound to furnish transportation in kind to the place to which the discharged soldier is entitled to be transported, if upon some public line of transportation, although it may not be possible to secure through transportation at the place of discharge from such place to the place of destination.

(94-330, J. A. G., Nov. 22, 1912.)

TRAVEL ALLOWANCES: To discharged soldiers; transportation and subsistence to place of enlistment.

The act of August 24, 1912 (37 Stat., 576), provides that an enlisted man discharged, except by way of punishment for an offense, shall be entitled to transportation in kind and subsistence from the place of discharge to the place of his enlistment, or—

"To such other place within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to place of enlistment."

Held, that such transportation and subsistence must be furnished without regard to the cost, but that the Government is not called upon to furnish transportation to points reached only by private conveyances, and the statute is satisfied by furnishing the same to some place upon a line of public transportation nearest to the place selected by the soldier.

(94-332, J. A. G., Oct. 28, 1912.)

Held, that the law nowhere makes provision for the family of an officer separately and apart from the officer, and that payments for heat and light furnished as the allowance of officers absent on temporary duty or on leave and supplied to their families at places other than their regular stations can not be allowed.

(Asst. Comp. of the Treas., Oct. 28, 1912.)

TAXATION: Duty, under the Philippine tariff, on jute bags used as containers of United States property.

The Quartermaster's Department shipped from the United States to the depot quartermaster in the Philippines a quantity of oats in jute bags for the use of the Army. These oats were grown in the United States, but the bags in which they were contained had been manufactured in the United States from imported raw material and a drawback of the duties assessed thereon had been allowed under the general customs tariff laws of the United States. The Philippine Government claimed that duty should be paid on the bags containing the shipment of oats at the rate of 2 cents each under the Philippine tariff act of August 5, 1909 (36 Stat., 130), which, unlike the preceding act of March 3, 1905 (33 Stat., 974), omits to include in its free list supplies imported by the United States Government for its use. Section 8 of said act of 1909 provides (p. 137)—

"That the rates of duties to be collected on articles, goods, wares, or merchandise * * * going into said islands from the United States or any of its possessions except as otherwise provided in this act, shall be as follows: * * *

"Gunny sacks, each two cents" (*idem*, p. 150.)

Exceptions to the payment of duty are made in said act as follows:

"No duties shall be assessed on account of the usual coverings or holdings of articles, goods, wares, or merchandise dutiable otherwise than *ad valorem*, nor those free of duty, except as in this act expressly provided." (Rule 13 (*h*), sec. 2, *idem*, p. 135.)

"The following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph. * * *

"351. Coverings and holdings of articles, goods, wares, and merchandise (usual), except as expressly provided." (Sec. 11, *idem*, pp. 172, 173.)

"That all articles, except rice, the growth, product, or manufacture of the United States and its possessions, to which the customs tariff in force in the United States is applied and upon which no drawback of customs duties has been allowed therein, going into the Philippine Islands shall hereafter be admitted therein free of customs duty when the same are shipped directly from the country of origin to the country of destination." (Sec. 12, *idem*, p. 173.)

Held, that the exceptions mentioned in said rule 13 (*h*) in section 2 and in section 11 do not apply to the usual coverings which the act expressly makes dutiable, and therefore do not apply to gunny sacks which are specifically made dutiable; and that as a drawback of the customs duty had been allowed in the United States on the

Upon consideration of the question as to whether persons employed upon a dredge employed in Government work should be considered as "laborers or mechanics" within the meaning of the law, and also as to whether cases where contractors had required or permitted such persons to labor more than eight hours in any one calendar day should be reported in pursuance of the act. *Held*, that by the established rule of the Federal courts all persons regularly employed upon a dredge to assist in its operations as such are seamen and not "laborers or mechanics," and that the nature of their duties makes no difference in the rule. See *Eastern Dredging Co. v. United States*, 206 U. S., 246, 258, *et seq.* *Held further*, that the act of June 19, 1912, should receive the same construction as that given in said decision to the act of August 1, 1892, and that the laborers and mechanics therein mentioned do not include laborers upon dredges, which latter are to be classed as seamen, who do not come within the operation of the law. It will not be necessary, therefore, to report the cases of any persons working upon dredges more than eight hours a day when engaged upon dredging work under a Government contract.

(Atty. Gen., Nov. 27, 1912.)

EIGHT-HOUR LAW: Work contemplated by the contract; contracts for the purchase of projectiles and smokeless powder.

The Secretary of the Navy requested an opinion as to whether section 1 of the act of June 19, 1912 (37 Stat., 137), contemplates that laborers and mechanics shall not be required nor permitted to work more than eight hours a day on work generally, or only said length of time daily upon work contemplated by the Government contract; that is, whether a mechanic, after working eight hours in one calendar day upon work covered by a Government contract, may not, without violating the eight-hour restriction, labor for a further period upon work which the Government contractor may be doing for private parties or for the Government under another contract. An opinion was further desired as to whether the law included work other than that directly contemplated by the contract, such as work in the production and segregation of the materials required, or in the operation of a plant used in the work of the contract; also, whether the law applied to contracts for the purchase of projectiles and smokeless powder, it being stated that there is no sale in this country for such articles except to the Government, that projectiles are delivered to the Government in the shape of finished, treated forgings which are to be fused and loaded to place them in a condition for service, and that the Government manufactures regularly a large proportion of the smokeless powder used by it.

Held, (1) that the eight-hour workday restriction of the act of June 19, 1912, known as the eight-hour law, applies only to work contemplated by the contract—that is, work directly and proximately in view of the contract as specifically appropriated and destined for the Government use; (2) that contracts for the purchase of projectiles are not excepted from the operation of the eight-hour restriction under the term "supplies" or "materials or articles as may usually be bought in open market," which latter are in terms ex-

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No. 4. }

WAR DEPARTMENT,
WASHINGTON, *February 1, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of January, 1913, and digests of certain decisions of the Comptroller of the Treasury are published for the information of the service in general.

[2005454, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

H. O. S. HEISTAND,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

BONDS: Of guaranty; release of sureties by modification of contract.

A contract provided for the manufacture and delivery of a certain quantity of single-conductor intermediate cable. The specifications and advertisement under which the contract was let formed a part of the contract, and prohibited the use, *inter alia*, of ozokerite in the manufacture of the cable. After the greater portion of the cable had been delivered, permission was requested to use ozokerite in the compound to be put into the cable. Two bonds were given, one covering a guaranty of the cable for three years "against all defects of material and workmanship," and the other guaranteeing the faithful fulfillment of the contract. *Held*, that to grant the permission requested would amount to a substantial modification of the contract and would release the sureties on both bonds. *Advised*, therefore, if it be desired to grant the permission requested, that a supplemental contract be made modifying the original contract so as to grant such permission, and that the assent to such modification be obtained from the sureties on both bonds.

(12-331, J. A. G., Jan. 16, 1913.)

BUREAU OF INSULAR AFFAIRS: Appointment of officer as chief.

Section 5 of the act of August 24, 1912 (37 Stat., 594), provides in general that, except where otherwise specially provided, when an officer shall, under the provisions of section 26 of the act of February 2, 1901, "be appointed to an office above that of colonel his appointment

he was in command of the machine-gun platoon of the regiment, the platoon being composed in part of a detachment consisting of one corporal and six privates of the company to which the officer belonged by formal assignment. He claimed that while on duty in command of the platoon he was at all times on duty with a detachment from the company to which he was assigned, and in addition was always considered as available for duty with the company and attended formations with the company, such as parades, reviews, etc., when the machine-gun platoon as such was not present at those formations.

The enlisted personnel of the machine-gun platoon of a regiment is made up of enlisted men detached from several companies of the regiment, and although the platoon is not a statutory organization, it is in fact a separate organization having no necessary relation with any of the companies of the regiment, except in so far as the members of the platoon may be carried on the rolls of the statutory organizations from which such members have been detached for the purpose of assigning them to duty with the platoon (G. O. No. 113, War Dept., 1906; G. O. No. 47, War Dept., 1910). The platoon is an adjunct or provisional unit of the regiment, or of one of the battalions thereof, but not of any company. The captain of the company from which the platoon commander is detailed has no more to do with the command of the platoon than has any other captain of the regiment.

Applying the principle laid down in a former opinion (6-124, Nov. 18, 1912) to determine when an officer commanding a detached portion of his company is to be considered as actually present for duty with his company, *Held*, that a lieutenant in command of a machine-gun platoon is, as such commander, to all intents and purposes detached from the company to which he may have been formally assigned; and the mere fact that a portion of the personnel of the platoon is drawn from the company to which the platoon commander stands formally assigned can not serve to make his performance of duty with the platoon duty with his company in the sense of the detached-service provision of the act of August 24, 1912.

(6-124, J. A. G., Jan. 15, 1913.)

DETACHED SERVICE: Duty with company; attending as a witness in obedience to a subpoena.

A captain of infantry whose detachment from his company was forbidden by the act of August 24, 1912 (37 Stat., 571), relating to detached service, was subpoenaed to attend as a witness at a trial before a civil court. His company and battalion were under orders to leave for another station and the obedience of the subpoena would necessitate a separation from his company. *Held*, that while the officer is absent from his company in obedience to a subpoena, he is not actually present for duty "with his organization," but he is not to be considered as detached from his organization "for duty of any kind" in such sense as to bring into operation the penalty clause of the statute, nor should he be considered as so detached if permitted, after service of the subpoena, to delay his departure until after the date set for the trial at which he is to testify.

(6-124, J. A. G., Jan. 10, 1913.)

EXTRA DUTY: Construction of statutes; detailing men on extra duty in the Quartermaster Corps.

An opinion was requested as to whether it would be legal to continue the temporary employment of enlisted men on extra duty in the Quartermaster Corps after the provisions of section 4 of the Army appropriation act of August 24, 1912 (37 Stat., 593), relating to the enlistment of men in the Quartermaster Corps to take the place of enlisted men detailed therein on extra duty, shall have been carried into full effect.

Section 1287 of the Revised Statutes, as amended by the act of July 5, 1884 (23 Stat., 110), authorized the employment of enlisted men on extra duty. Section 4 of the act of August 24, 1912, *supra*, authorized the enlistment in the Quartermaster Corps of a certain number of men to permanently replace, among others, all enlisted men of the line of the Army detailed on extra duty in said corps. *Held*, that said act of August 24, 1912, did not expressly or by implication repeal section 1287, Revised Statutes, and amendments, authorizing the employment of enlisted men on extra duty, and that, after the enlisted men of the line of the Army employed on extra duty in the Quartermaster Corps have been substituted by the full number authorized to be enlisted for this purpose by section 4 of the act of August 24, 1912, additional men may be detailed on extra duty in said corps pursuant to said section 1287 should such detail, in the judgment of the administrative officers, be deemed necessary.

(6-224.1, J. A. G., Jan. 17, 1913.)

LINE OF DUTY: Effects of operation to remove a physical defect existing before entering the service.

A surgical operation was performed upon an officer to remove a physical defect existing before he entered the service, as a measure of caution by creating a physical condition favorable to the officer's health. The operation caused an illness which had been entered upon the records as not in line of duty. The defect was not the result of the officer's misconduct nor was it such as to unfit him for duty. *Held*, that the operation may be regarded as the proximate cause of the illness and not the defect itself which existed prior to his entering the service. The illness should therefore be entered upon the records as in line of duty.

(54-011, J. A. G., Jan. 11, 1913.)

MEDICAL TREATMENT: Officer injured while on leave.

An officer while on leave voluntarily engaged in the work of inspecting horses to be purchased by officers of the Army not required to be mounted, and while so engaged was severely injured by being kicked by one of the horses he was inspecting. The services of a civilian physician were procured and on his advice a special train was hired to take the officer to his station, where he was received into hospital. He was sick from the effects of the injury for a

TRAVEL ALLOWANCES: Of discharged soldiers; furnishing subsistence during travel over a longer route.

The Chief of the Quartermaster Corps submitted the question of whether, under the provisions of the act of August 24, 1912 (37 Stat., 576), in furnishing transportation in kind and subsistence to soldiers on discharge, such transportation may be furnished "via any route between competitive points where the cost of transportation and sleeping-car accommodations does not exceed the cost via the route over which the official distance is figured as published in the official distance table of the War Department," provided that no additional cost of subsistence is paid on account of the additional travel involved in the selection of the longer route.

Held, that the transportation authorized is between points and there is no provision that it shall be over the shortest usually traveled route, although travel could not properly be allowed over a longer route if the cost, including commutation of subsistence, be greater than over the shorter route; but if such cost is greater over the longer route, transportation over such route may nevertheless be furnished if the soldier indicates his preference to travel over such route and his willingness to accept commutation of subsistence not exceeding the amount he would receive should he travel over the shorter route.

(94-332, J. A. G., Jan. 27, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

FORAGE ALLOWANCE: Officers of the Medical Reserve Corps on leave of absence.

An officer of the Medical Reserve Corps of the Army on active duty was granted a leave of absence and ordered to his home to be relieved from active duty at the expiration of the said period of leave. The question was submitted by the Secretary of War as to whether or not he was entitled to be furnished forage by the Quartermaster Corps for mounts owned and kept by him at his home during the period of his leave of absence.

The act of April 23, 1908 (35 Stat., 68, 69), provides for the issue of commissions as first lieutenants to certain graduates of medical schools found qualified on examination, which commissions shall confer upon the holders "all the authority, rights, and privileges of commissioned officers of the like grade in the Medical Corps of the United States Army, except promotions, but only when called into active duty," as thereafter provided, "and during the period of such active duty." The act further provides that during the period of such active service said officers "shall be entitled to the pay and allowances of first lieutenants of the Medical Corps." *Held*, that the acts of June 18, 1878 (20 Stat., 150), and February 24, 1881 (21 Stat., 347), providing for the furnishing of forage in kind to officers of the Army who own and keep their own mounts, contemplate the furnishing of such forage to officers for horses owned and kept by them in the performance of their official military duties when on duty as in said act specified, and at places where they are

ance by the United States and was under their control. No instructions were given by the contractors relative to the proper operation of the system, and it appeared that when the valves of said system were closed they entirely stopped the flow of water, it being in this respect unlike many other systems, which allow a slight flow at all times in order to prevent freezing.

Held, that the system being under the control of the contractors at the time the damage occurred, and the contractors having been negligent in not taking proper steps to prevent injury from freezing, the claim for extra compensation on account of such injury should be disallowed.

(76-732, J. A. G., Feb. 21, 1913.)

CONTRACTS: Assignment of when original contractor is unable to complete the work.

A company having a contract with the United States to supply coal during the fiscal year ending June 30, 1913, became financially embarrassed and a new company was organized by the principal stockholders of the old company to continue the business of the old company, and the contract assigned to such new company. The surety company guaranteeing the old contract executed a supplemental instrument whereby it agreed that its bond should cover the faithful performance of the contract by the assignee.

Held, that while the better form would have been a tripartite contract supported by a new bond whereby the assignee would contract directly with the United States for the completion of the contract and the assignor would agree directly with the United States that all payments should be made to the assignee, the facts here stated are not such as to bring the case within the prohibition of section 3737, Revised Statutes, forbidding the transfer of contracts with the United States, and the Chief of the Quartermaster Corps may therefore approve the assignment.

(76-520, J. A. G., Feb. 20, 1913.)

CONTRACTS: Parties to; including persons other than the bidder.

A contract was awarded to a party for the construction of a power plant under the War Department upon a bid submitted under instructions which required the bidder to enter into a contract and to give bond with satisfactory surety for its faithful performance, including also a stipulation for the protection of laborers and material men. The contractor signed the contract but, owing to his financial condition, was unable to furnish the required bond for the due performance of the contract, because of which the same was not signed on behalf of the United States. In order to secure such surety it was requested that a representative of a surety company be permitted to join as a partner in the contract, so as to give the surety company such joint control of the receipts and disbursements arising out of the contract as would make it reasonably safe for the company to become surety for the due performance of the work and for the payment of laborers and material men.

Upon request for an opinion as to whether a contractor, after employing laborers and mechanics on a contract coming within the eight-hour law for eight hours in any calendar day, might continue such employment for an additional time on the same day on another contract not coming within the operation of said law, *held*, that the statute operates only upon the particular contract subject to its provisions; that the supervision by Government officials required by the statute extends only to work contemplated by the contract; and that a Government contractor under a contract coming within the operation of the law, may employ laborers and mechanics thereon for eight hours a day and thereafter continue their employment on the same day on another contract with the Government not coming within the operation of the law, without incurring the penalties prescribed by said law.

(32-300, J. A. G., Feb. 5, 1913.)

MILITIA: Organization of enlisted men of, into a reserve.

Section 3 of the act of January 21, 1903 (32 Stat., 775), as amended by section 2 of the act of May 27, 1908 (35 Stat., 399), provides that—

“On and after January 21, 1910, the organization, armament, and discipline of the Organized Militia in the several States and Territories and the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War.”

Section 2 of the Army appropriation act of August 24, 1912 (37 Stat., 590), provides for a seven-year enlistment period, and also, among other things, provides for an Army reserve.

Held, that the Army reserve provided for by said act of August 24, 1912, is not an organization within the meaning of the act of January 21, 1903, and that the Secretary of War, under existing law, can not require the Organized Militia of the several States to organize and maintain reserves similar to that provided for the Regular Army.

(6-300, J. A. G., Feb. 17, 1913.)

OFFICERS OF THE ARMY: Appointment and lineal rank.

Section 1219 of the Revised Statutes provides—

“In fixing relative rank between officers of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account. And in computing such time, no distinction shall be made between service as a commissioned officer in the Regular Army and service since the 19th day of April, 1861, in the volunteer forces, whether under appointment or commission from the President or from the governor of a State.”

Section 3 of the act of June 18, 1878 (20 Stat., 150), provided for the filling of vacancies in the grade of second lieutenant by the

that the fact that the contractor himself may have contributed to the mistake was immaterial, as no damage was caused thereby for which compensation was sought.

(76-732, J. A. G., Feb. 21, 1913.)

SUPPLIES: Purchase of, for Walter Reed General Hospital, District of Columbia.

Section 4 of the act of June 17, 1910 (36 Stat., 531), provides generally that all supplies, fuel, ice, stationery, and other miscellaneous supplies "for the executive departments and other Government establishments in Washington," when the public exigencies do not require immediate delivery, "shall be advertised and contracted for by the Secretary of the Treasury," and provides for a general supply committee to make an annual schedule of the required miscellaneous supplies and to perform certain other duties connected with carrying the provisions of said act into effect.

On request for an opinion as to whether supplies required for the Walter Reed General Hospital, Takoma Park, D. C., must be secured under contract with the general supply committee in pursuance of said act, *held*, that inasmuch as said hospital is not a part of the civil establishment known as the War Department, but is substantially an Army hospital or post located for convenience in the District of Columbia, the supplies necessary therefor, the same as those required for the military post of Washington Barracks, should be procured under a contract made with the proper department of the Army, and that the act of June 17, 1910, has no application.

(14-120.1, J. A. G., Feb. 28, 1913.)

TRANSPORTATION: Of household effects on change of station.

An officer was directed to change station to a post where there were no available quarters for his accommodation, and had his household effects shipped to the post and stored in the warehouse of the depot quartermaster until such time as he could secure quarters for himself. Upon securing such quarters, he was informed that he would have to bear the expense of hauling his goods from the warehouse to his residence, situated some distance from the post, and he was consequently compelled to move them at his own expense.

Held, that the officer on change of station was entitled to have his authorized allowance of household effects transported to his new station at public expense, and, if quarters in kind were not available and he was compelled to procure quarters for himself, this included transportation to the quarters thus secured; but his quarters must be selected with a view to public interests rather than according to his own preference, and he was only entitled to have his allowance of personal effects transported at public expense to the nearest point to his post of duty where he could have procured suitable quarters at an expense commensurate with his salary; *held*, therefore, that the officer should be reimbursed in this case to the amount that it would have cost the Government to have transported his effects from the

claim for the difference between the price paid and the price fixed for deliveries after March 31, 1912, amounting to \$252.48. The Government under the contract had a right, had the order of March 19, 1912, been given within sufficient time to allow delivery by the end of that month, to cancel the order upon failure of the contractor to make such delivery and to purchase a like quantity of oats in open market, charging the contractor with the difference between the contract price and the price which the Government would have been compelled to pay in excess thereof.

On appeal from the action of the Auditor for the War Department disallowing the claim: *Held*, that the parties to the contract having provided a remedy and a measure of damages in case of failure of the contractor to make deliveries within the time specified, to wit, the purchase by the Government in open market of oats of the quantity and kind demanded under the contract, charging the contractor with the difference in price if in excess of the contract price, and the Government not having exercised its right, but having accepted delivery within the period for which payments should have been made at the rate of \$1.67 per hundredweight, the oats so delivered must be paid for at that rate, as provided in the contract. The claim was therefore allowed.

(Comp. of the Treas., Feb. 17, 1912.)

GOVERNMENT AGENCIES: Stoppage of soldier's pay to reimburse a post exchange for overpayment in cashing his final statements.

A man enlisted at Jefferson Barracks, Mo., August 27, 1909, and was discharged August 26, 1912, at Fort Rosecrans, Cal., by expiration of enlistment. His final statements on discharge were cashed by the post exchange at Fort Rosecrans upon the basis that he was entitled to mileage from the place of enlistment to the place of discharge at the rate of 4 cents per mile, whereas the soldier having been discharged after the passage of the Army appropriation act of August 24, 1912 (37 Stat., 576), was entitled to mileage only at the rate of 2 cents per mile for such travel, having elected to receive such mileage instead of transportation in kind and subsistence. He was thus overpaid by the post exchange on his final statements the sum of \$43.07, and having since reenlisted the amount was collected from him on the pay roll of his company and deposited to the credit of the United States, with the evident purpose of reimbursing the post exchange. The cashing of the final statements by the post exchange was purely a matter of accommodation to the soldier.

On claim by the soldier for reimbursement: *Held*, that the post exchange was not a voluntary association, but an institution established by the Government for the use and discipline of the enlisted men, and that the collection from the soldier was properly made.

(Comp. of the Treas., Feb. 8, 1913.)

PRIVATE PROPERTY: Loss of horse belonging to an Army officer while in the service; act of March 3, 1885.

The act of March 3, 1885 (23 Stat., 350), provides: "That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine

termaster General of the Army verbally waived the time limit, and afterwards confirmed the verbal waiver by letter. The contractor delayed completion of the vessel for 95 days after the time fixed by the contract exclusive of Sundays and legal holidays, but payment was made in full without reduction for such delay. Subsequently the same contractors completed another contract for the construction of a vessel for the United States, and in making payment therefor the Government officials withheld an amount sufficient to cover the liquidated damages arising under the first contract at the rate specified therein. It was not shown that the Government suffered any actual pecuniary damage by the delay in completing the first contract.

Held, that the waiver of the time for the completion of the first contract was not a waiver of the right of the Government to claim liquidated damages for such delay, the Government not being responsible for the delay and the waiver not fixing any new date from which to compute the liquidated damages; and *held further*, that the amount of such liquidated damages might be deducted in making settlement for the work done under the last contract. *Wisconsin Central Railroad Co. v. United States* (164 U. S., 190, 212), and other cases cited.

(*Maryland Steel Co. v. United States*, Ct. Cls., No. 31281, Dec. 2, 1912.)

GOVERNMENT AGENCIES: Responsibility of an officer of the Marine Corps for post exchange funds under his control.

An officer of the Marine Corps was duly designated as post exchange disbursing officer, and came into possession of moneys in said capacity under proper orders pursuant to Navy Regulations. The Navy Regulations at the time provided for the establishment of post exchanges, the method of conducting the same and their sources of income, the manner of keeping accounts, etc. A board of officers appointed to audit the post exchange officer's accounts reported that a shortage existed, but that in their opinion the same "did not result from any carelessness, neglect, or misappropriation" on the part of such officer. The findings of the board were immediately disapproved by the commanding officer. A second board, convened for the purpose of investigating the alleged theft of funds from the post exchange officer, reported that it was unable to obtain evidence fixing the guilt upon any person or persons. This report was likewise disapproved by the commanding officer of the post. Thereafter a court of inquiry was convened at Washington, D. C., for the purpose of investigating the alleged theft of funds from said officer, and reported that the officer, "as custodian, has failed to show satisfactorily that the money was taken from him through no neglect of his own," and that he "was responsible for the funds of the post exchange, company fund, commissary fund, and bakery fund, to the amount of \$959.08, for which he has failed to satisfactorily account." The officer having died, the board recommended that his decedent be held responsible and the amount deducted from any pay that might be found to be due to the deceased officer, and such amount refunded to said funds. The proceedings, findings, and recommendations were approved by the commanding officer of the Marine Corps, and also by the Secre-

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WAR DEPARTMENT,
WASHINGTON, April 2, 1913.

The following digest of opinions of the Judge Advocate General of the Army for the month of March, 1913, and of certain decisions of the Comptroller of the Treasury, and of an opinion of the Attorney General is published for the information of the service in general.

[2023920, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Contingencies, headquarters of military departments; availability for brigade and Coast Artillery district headquarters.

The Army appropriation act of March 24, 1912 (37 Stat., 570), appropriates as follows:

“Contingencies, headquarters of military departments: For contingent expenses at the headquarters of the several military divisions and departments, including the Staff Corps serving thereat, * * * to be allotted by the Secretary of War, and to be expended in the discretion of the several military division and department commanders, \$7,500.”

Under recent regulations promulgated in General Orders, No. 9, War Department, 1913, territorial divisions and departments were superseded by territorial departments, and tactical divisions and brigades were organized.

Held, that the words “headquarters of the several military divisions and departments” could not be construed to include brigade and artillery district headquarters, and that said appropriation was therefore not available for allotment to brigade or artillery district headquarters.

(5-214, J. A. G., Mar. 22, 1913, and 52-241, Mar. 25, 1913.)

APPROPRIATIONS: Incidental expenses of holding an international rifle-shooting competition.

The Army appropriation act of March 2, 1913 (Public, No. 401, p. 9), appropriates—

“To meet expenses incident to holding an international rifle-shooting competition at Camp Perry, Ohio, in cooperation with the Perry

except in the discretion of the officer making the removal, and copies of charges, notice of hearing, answer, reason for removal, and of the order of removal, shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; * * *."

Two officers in the classified civil service were charged with negligence in connection with the sinking of a Government vessel at the dock by reason of water entering a porthole which had been left open, and it was proposed to take disciplinary action against them. It appeared that the specific acts and omissions which constituted the negligence charged against the officers were stated in writing and given to both officers; that they were furnished with copies of the charges and were allowed a reasonable time for personally answering the same in writing, which they did in full; that no affidavits were filed by the Government in respect to the charges, the facts concerning the sinking of the vessel having been taken cognizance of by the military authorities and reported upon in the performance of their duties; and that the only question was as to the legal inference of negligence to be drawn from the facts stated and admitted. Subsequently an inspector, by order of the Secretary of War, made the usual military investigation, of which the two officers had actual notice, and during which they testified before the inspector.

Held, that the investigation by the inspector was not a trial, as that officer was not a tribunal, and that the requirements of said section of the act of August 24, 1912, regarding the reduction in rank and compensation of classified employees in the civil service, had been fully complied with in said cases; *held further*, that the negligence being established, the proper authority might, for the purpose of guiding his discretion in determining what action should be taken, inform himself of the general efficiency of said officers, but that in case of discharge general inefficiency would not become the real and legal reason for such action.

(16-210, J. A. G., Mar. 12, 1913.)

CONTRACTS: Relief against, where deliveries were discontinued by reason of the removal of troops.

Contracts were entered into for the delivery of hay, straw, and other forage at certain posts within the fiscal year 1913, from time to time as ordered, each contract containing a clause reading as follows:

"If during the period of this contract the troops or garrison be withdrawn in whole or in part from the post or station, or other radical change be made in the service by which the supplies will not be required, the contract shall become inoperative accordingly."

Troops were withdrawn from the posts indicated for concentration at Galveston, Tex., and further deliveries under the contracts were in consequence discontinued. The contract price for the delivery of the forage at the posts contracted for was greater in all cases than the cost of obtaining such material in the open market at Galveston.

Held, that the Government, by discontinuing deliveries under the contracts, had only exercised an indisputable right which the Government officials were not at liberty to disregard, and that nothing could be done to relieve the contractors from the operation of the

its own special regulations. The military personnel under the general command and control of the commanding officer of the post of Fort Riley, Kans., includes the personnel of the Mounted Service School.

Held, that the commandant of the Mounted Service School at Fort Riley, Kans., was the commander primarily to be looked to by superior authority as the officer responsible for the administration of the discipline of the enlisted men connected with said school; that in the sense of the summary court act the enlisted men under the command and control of the commandant of said school constituted a "detachment in the Army"; and that the commandant was competent to appoint a summary court for the trial of enlisted men belonging to his command, subject to the right of the commanding officer of the post of Fort Riley to appoint such court when by him deemed desirable.

(30-730, J. A. G., Mar. 13, 1913.)

DISCIPLINE: Remission of punishment; reduction in files and subsequent promotions.

An officer of the Army was tried by a general court and sentenced "to be reprimanded by the reviewing authority and be reduced in military rank ten files in the lineal list of second lieutenants of Artillery."

The sentence was approved, the reprimand administered, and the officer reduced in files according to the sentence. The officer was subsequently promoted to captain and the ten officers who gained one file each by reason of the sentence of the court had also been promoted. Application was made for the remission of the sentence reducing the officer in lineal rank.

Held, that the promotion of the officer suffering a reduction in files and the promotion of the ten officers benefiting in lineal rank by such reduction operated to make the punishment no longer a continuous one in the sense that it could be reached by the power of remission or by the power of pardon; and that the case had passed beyond the power of the reviewing authority to remit the punishment.

(68-111.1. J. A. G., Mar. 26, 1913.)

EIGHT HOUR LAW: Work upon two contracts, both within the operation of the law.

The following question was submitted for decision relative to the proper construction to be placed upon the eight-hour law of June 19, 1912 (37 Stat., 137):

"Can a contractor work an employee eight hours in a calendar day upon one contract coming within the provisions of the eight-hour law and then work the same mechanic or employee upon another contract coming within the provisions of the law the same calendar day, whether or no the second contract covers a like or different material, and whether or no the second contract be from one department of the Government or another?"

The Attorney General, in an opinion dated October 3, 1912 (29 Opin., 534), held that "the eight-hour workday restriction of the act

Held, that the portion of the permanent annual appropriation for the support of the militia which was available for and devoted to paying the militia for attendance at maneuvers and camps of instruction was payable only to the regularly enlisted, organized, and uniformed *active* militia; that militia reservists, even though under State legislation they were subject to orders to attend annual encampments and maneuvers, or were authorized to attend such encampments and maneuvers at the option of the individual concerned, did not constitute part of the *active* militia within the meaning of the Federal legislation making provision for paying the militia for participation in maneuvers and camps of instruction; and that, therefore, the questions submitted should be answered in the negative.

(58-650, J. A. G., Mar. 25, 1913.)

NATIONAL CEMETERIES: Advertisements offering rewards for the arrest of persons defacing monuments.

The appropriation for the Gettysburg National Park contained in the act of August 24, 1912 (37 Stat., 442), covers the expense of "marking the lines of battle with tablets and guns, * * *; preserving the features of the battle field and monuments thereon; * * * and all other expenses incidental to the foregoing."

Upon the question of whether a reward of \$100 could legally be offered and paid for information leading to the arrest of persons who had defaced certain of the monuments on said battle field, *Held*, that the appropriation in question was broad enough to include provision for all reasonable and proper means for the protection and preservation of the monuments on the battle field; that the payment of a reward for information leading to the arrest of persons who had defaced the monuments was a reasonable and proper means of securing such protection; and that there was no objection to the approval of a request to insert advertisements in the newspapers offering to pay a stipulated reward for such information.

(80-015, J. A. G., Mar. 7, 1913.)

PAY AND ALLOWANCES: Forage, use of, issued for authorized mounts in maintaining mounts not authorized.

It was desired to know whether an officer having two authorized mounts and, in addition, one young undersized colt could use the forage issued for his authorized mounts in maintaining all three of his horses, the amount issued being amply sufficient for that purpose.

Held, that forage issued for the maintenance of the authorized number of horses of an officer was not to be taken as an emolument out of which he might make a saving or a profit, and that forage issued and not used in the maintenance of his authorized mounts should be accounted for as public property, and could not be used in maintaining horses not required to be kept by him in the public service.

(72-350, J. A. G., Mar. 12, 1913.)

listed men, employees, and supplies of the Navy, the Marine Corps, * * * [and] officers of the War Department * * *, while traveling on official business, and without expense to the United States, for the families of those persons herein authorized to be transported * * *."

The Secretary of the Navy requested transportation on a United States Army transport for the father-in-law, mother-in-law, and sister-in-law of a chief electrician in the Navy from San Francisco, Cal., to Honolulu, Hawaii. It appeared that the wife of said chief electrician had died, and that he and his two minor children had made their permanent home with said relatives.

Held, that while the law did not specify who should constitute the family of an officer or enlisted man who might be furnished transportation on an Army transport, or how closely related to the officer or enlisted man they must be in order to constitute such family, the persons for whom it was proposed to furnish transportation having been attached in their family relations to the chief electrician might be considered as members of his family, and that transportation on an Army transport might be furnished them, if they were removing to the station of the chief electrician and to a home such as they had occupied with him before making the change, and were not making the trip merely as a visit.

(94-110, J. A. G., Mar. 11, 1913.)

The question having been submitted as to whether, under the act of March 2, 1907 (34 Stat., 1170), a member of an officer's family who would be allowed to accompany him when traveling on official business would be permitted to join him by a later transport than the one upon which he proceeded to his station, *held*, that, considering the fact that the order under which an officer changes his station often required him to leave on such short notice as not to permit him to take his family with him, a regular member of such officer's family who would have been allowed under the provisions of said act to accompany him might be provided, at a later date, with transportation on an Army transport for the purpose of joining the officer at his new station.

(94-110, J. A. G., Mar. 14, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the Office of the Judge Advocate General.)

CONTRACTS: Time of completion; delay in approving.

A contract dated June 29, 1911, was entered into for the installation of certain electrical apparatus at an Army post, which provided that the work in said contract—

"shall commence on or before the 30th day of June, 1911, and shall be carried on with reasonable dispatch and be completed on or before the 13th day of November, 1911."

It was further provided that such contract was made "subject to the approval of the Quartermaster General, U. S. Army," but it was not actually approved by that officer until September 21, 1911. By

ment or maneuver must have been enlisted for at least three months prior thereto, or have had an equivalent service in the Army, in the Marine Corps, or in the Organized Militia. No provision was made in the regulations for depriving members of the Organized Militia from receiving transportation and subsistence in connection with said encampments or maneuvers in case they did not come within the requirements for the receipt of Federal pay.

A disallowance had been made in the accounts of a disbursing officer on account of overpayment for subsistence for militia attending the joint encampment at Fort Riley, Kans., on the ground that by actual count, as shown by the Federal pay rolls, the cost of the number of rations for the men participating in said encampment estimated at 25 cents per ration aggregated less than the amount paid for such subsistence. This disallowance had been affirmed by the Comptroller by certificate of difference only, and a reconsideration was asked for by the Secretary of War.

Held, that under the circumstances payment for transportation and subsistence of men belonging to the Organized Militia attending joint encampments or maneuvers with the Regular Army under authority of the Secretary of War might be made, although such men might not come within the requirements which would entitle them to participate in Federal pay, and resort to other evidence than the pay rolls might be had in order to ascertain who were entitled to such transportation and subsistence. The case was therefore reopened in order to allow the disbursing officer to submit evidence showing the number of men for whom transportation and subsistence were paid and who participated in the joint encampment.

(Comp. of the Treas., Feb. 19, 1913.)

PAY ALLOWANCE: Forage allowance to military attachés not owning their own mounts.

Section 1272 of the Revised Statutes provides that—

“Forage shall be allowed to officers only for horses authorized by law, and actually kept by them in service when on duty and at the place where they are on duty.”

Section 8, of the act of June 18, 1878 (20 Stat., 150), provides that—

“Forage in kind may be furnished to the officers of the Army by the Quartermaster's Department, only for horses owned and actually kept by such officers in the performance of their official military duties when on duty with troops in the field or at such military posts west of the Mississippi River, as may be from time to time designated by the Secretary of War, and not otherwise, as follows:”

Then follows a statement of officers of different grades with the number of horses authorized for each.

The act of February 24, 1881 (21 Stat., 347), provides that—

“There shall be no discrimination in the issue of forage against officers serving east of the Mississippi River, provided they are required by law to be mounted, and actually keep and own their animals.”

Vouchers for the purchase of the authorized allowance of forage for horses kept by a military attaché serving abroad were disallowed.

Rule 16 of said tariff provided that the consignor of goods might elect to have a limited liability or a common carrier's liability service, and stipulated that ten per centum higher rate should be charged for the increased liability service.

Advised further, that the commodity rates provided for by said tariff were the lawful and only rates that might be used for the transportation of the household goods indicated between the points for which said commodity rates were published, and that an ordinary shipment on a regular form of Government bill of lading, which provided for shipment at owner's risk, would, therefore, take a lower rate, but if shipped at carrier's risk, the higher rate would apply.

(Comp. of the Treas., Feb. 25, 1913.)

OPINION OF THE ATTORNEY GENERAL.

(Digest prepared in the Office of the Judge Advocate General.)

TRANSPORTATION: Use of franking privilege in transporting matter pertaining to official business under the parcel-post law.

The Secretary of the Interior asked to be advised whether his department and its various bureaus and offices were entitled to the benefit of the parcel-post law, and whether they had a right to send by parcel post fourth-class matter not exceeding 11 pounds in weight under penalty envelopes and labels.

The pertinent provisions of the act of August 24, 1912, establishing the parcel-post system are as follows:

"Sec. 8. That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery * * *."

"That the rate of postage on fourth-class matter weighing not more than four ounces shall be one cent for each ounce or fraction of an ounce; and on such matter in excess of four ounces in weight the rate shall be by the pound, as hereinafter provided, the postage in all cases to be prepaid by distinctive postage stamps affixed. (37 Stat., 557.)"

Prior to the enactment of the statute creating the penalty privilege the following sections of the Revised Statutes were in force:

"Sec. 3896. Postage on all mail matter must be prepaid by stamps at the time of mailing unless herein otherwise provided for.

"Sec. 3897. All mail matter of the third-class must be prepaid in full in postage stamps at the office of mailing."

The departments were expressly required to purchase said stamps for official use. (Sec. 3915, R. S., as amended Feb. 27, 1877, 19 Stat., 250.) At this time the third class of mail matter included merchandise as well as miscellaneous printed matter.

Section 17 of the act of March 3, 1879 (20 Stat., 359), defined mail matter of the third class to embrace "books, transient newspapers, and

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WAR DEPARTMENT,
WASHINGTON, *May 6, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of April, 1913, and of certain decisions of the Comptroller of the Treasury, opinions of the Attorney General, and decisions of the courts, is published for the information of the service in general.

[2034028, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: Leave of, to clerks and employees in the executive departments.

Section 7 of the act of March 15, 1898 (30 Stat., 316), requires that the heads of the several executive departments shall exact of all clerks and employees in their respective departments not less than seven hours of labor each day, except on Sundays and public holidays, and further provides as follows:

“The head of any department may grant thirty days’ annual leave with pay in any one year to each clerk or employee: *And provided further,* That where some member of the immediate family of a clerk or employee is afflicted with a contagious disease and requires the care and attendance of such employee, or where his or her presence in the department would jeopardize the health of fellow clerks, and in exceptional and meritorious cases, where a clerk or employee is personally ill, and where to limit the annual leave to thirty days in any one calendar year would work peculiar hardship, it may be extended, in the discretion of the head of the department, with pay, not exceeding thirty days in any one case or in any one calendar year.”

Certain employees of the office of the Chief of the Quartermaster Corps at Washington, D. C., had been absent from duty on account of illness due to vaccination against smallpox.

Held, that the law permits the granting of thirty days’ leave with pay in each calendar year, which is to be exclusive of Sundays and legal holidays, but that said period may be extended not to exceed thirty days on account of personal illness or in other exceptional and

to its restrictions. Their employment was to be continued during the fiscal year commencing July 1, 1913, and they were to be paid from a similar appropriation contained in the Army appropriation act of March 2, 1913, which latter appropriation would come within the restrictions of the act of August 26, 1912, but the act containing such appropriation was passed before the act amending the one last mentioned. The compensation of said inspectors had been increased during the fiscal year 1913, and an opinion was desired as to whether this increase could be continued for the succeeding fiscal year or whether their compensation should be limited to the rates paid during the fiscal year 1912, as specified in the general deficiency act before amendment.

Held, that the appropriations referred to in the amendatory law were the same as those described in the law which it amended, and that the rates of compensation for personal services paid from lump-sum appropriations coming within the operation of said act were to be governed by the rates paid during the preceding fiscal year. *Held further*, that the pay of these inspectors might be increased during the fiscal year 1913, as the appropriation from which they were then paid was not subject to the restrictions of the act of August 26, 1912, and that they might be paid such increased compensation during the succeeding fiscal year, as the appropriation for such year would come within the operation of the law as amended.

(5-075, J. A. G., Apr. 14, 1913.)

CIVIL SERVICE: Removal of classified employees; superintendent of the Antietam battle field.

The superintendent of the Antietam battle field is provided for by the annual appropriation in the act of August 24, 1912 (37 Stat., 440), of the sum of \$1,500—

“For pay of superintendent of Antietam battle field, said superintendent to perform his duties under the direction of the Quartermaster’s Department and to be selected and appointed by the Secretary of War, at his discretion, the person selected and appointed to this position to be an honorably discharged Union soldier.”

Opinion was desired as to whether or not this position came within the requirements of section 6 of the act of August 24, 1912 (37 Stat., 555), which provides for written charges and hearings before discharge, and the record thereof, as to every “person in the classified civil service of the United States.”

The classified service is defined in Rule 2 of the Civil Service Rules as including—

“All officers and employees in the executive civil service of the United States, heretofore or hereafter appointed or employed, in positions now existing or hereafter to be created, of whatever function or designation, whether compensated by fixed salary or otherwise, except persons employed merely as laborers, and persons whose appointments are subject to confirmation by the Senate.”

Held, that the position of superintendent of the Antietam battle field clearly came within this definition of the classified service, and that there was nothing in the appropriation to take it out of said service, although the provision that the superintendent should be se-

PUBLIC PROPERTY: Disposal of sewage on a military reservation, valuable for irrigation thereon.

The sewage of a military reservation was needed for use, after purification, in the cultivation of forage crops, gardens, etc., on the reservation. The military authorities recommended that the Government construct its own purification plant, for which part of the funds were already available, and use the sewage for the benefit of the post and reservation. It was shown that the raw sewage was worth \$6 per million gallons, and that the quantity would be from 2,000,000 to 3,000,000 gallons per day. A private company had offered to construct a purification plant and to receive and purify the sewage at its own expense and to save the Government harmless against the pollution of streams or other injuries incident to the use of the sewage, in return for the right to receive all the sewage from the reservation. Another company desired that the disposal of the sewage should be made the subject of public competition.

Held, that this sewage was the property of the United States, and having a positive and considerable value both commercially and for use on the Government reservation, where it appeared to be much needed, the Secretary had, under the circumstances, no authority to dispose of the same to private parties in either of the methods proposed.

(80-132, J. A. G., Apr. 16, 1913.)

RETIRED OFFICER: Assignment of, to active duty as post-exchange officer.

A retired Army officer expressed a desire to be assigned to active duty as post-exchange officer at a post where there were troops serving. The act of April 23, 1904 (33 Stat., 264), provides that—

“The Secretary of War may assign retired officers of the Army, with their consent, to active duty in recruiting, * * * and to staff duties not involving service with troops.”

A post-exchange officer is selected and detailed by the post commander, and as such is under the command and performs duties under the supervision of the same authority.

Held, that the duties of a post-exchange officer are not distinct from those of an officer serving with troops, but are habitually performed by an officer so serving, and that this officer might not lawfully be assigned to the duty in question.

(88-600, J. A. G., Apr. 8, 1913.)

ROADS AND STREETS: Control of, on military reservations; jurisdiction.

A strip of land on a military reservation, over which jurisdiction had been ceded to the United States, had been occupied by an emergency levee. A public highway which had existed as far back as 1846 had occupied for the greater part of its course across the reservation land then occupied by the new levee. The civil authorities desired that a new road be located across the reservation as nearly as possible to the line of the old road, and opened to public travel.

ASSOCIATIONS: Membership dues in International Association of Chiefs of Police.

The Auditor for the War Department disallowed an item of \$5 in the accounts of a disbursing officer, the same being for "annual dues for one year for membership of the Adjutant General in the International Association of Chiefs of Police," on the ground that payment of the same was prohibited by section 8 of the act of June 26, 1912 (37 Stat., 184), which provides:

"No money appropriated by this or any other Act shall be expended for membership fees or dues of any officer or employee of the United States or of the District of Columbia in any society or association or for expenses of attendance of any person at any meeting or convention of members of any society or association, unless such fees, dues, or expenses are authorized to be paid by specific appropriations for such purposes or are provided for in express terms in some general appropriation."

The voucher covering the disbursement in question was paid from the appropriation for "Incidental expenses, Quartermaster's Department, 1913," which does not specifically authorize the payment of membership fees or dues of any officer or employee of the United States in any society or association.

Held, that in view of the specific prohibition contained in said act of June 26, 1912, the payment of a membership fee in the International Association of Chiefs of Police was not authorized and that the disallowance by the auditor should be affirmed.

(Comp. of the Treas., Apr. 9, 1913.)

AVIATION SERVICE: Increase of pay and allowances for.

The Army appropriation act of March 2, 1913 (Public, No. 401, p. 3), provides that—

"The pay and allowances that are now or may hereafter be fixed by law for officers of the Regular Army shall be increased thirty-five per centum for such officers as are now or may hereafter be detailed by the Secretary of War on aviation duty: *Provided*, That this increase of pay and allowances shall be given to such officers only as are actual fliers of heavier than air crafts, and while so detailed: *Provided further*, That not more than thirty officers shall be detailed to the aviation service."

On application for opinion by the Secretary of War, *held*, that the increase of pay provided for in said act applies to the regular pay of an officer of the Army detailed for duty under said provision, including longevity pay, foreign-service pay, additional pay for providing mounts, or any other additional pay, and also commutation of quarters or any other allowance which the officer is entitled to receive in money while so detailed, including mileage for travel under orders; but that the law does not contemplate an increase in any allowance that the officer is entitled to receive in kind only, such as heat and light, medicines and medical attendance, quarters, forage, shelter for mounts, etc.

(Comp. of the Treas., Apr. 8, 1913.)

Held, on appeal, that the first bill having been paid within the period when discount should have been allowed, the overpayment of the amount of the discount was properly disallowed; and that the second bill not having been paid until after the right to the discount had lapsed, the company furnishing the gas became entitled to the full amount of the bill. The payment was, therefore, legally made, and the accounting officers were not justified in disallowing the amount of the discount.

(Comp. of the Treas., Apr. 3, 1913.)

QUARTERS: Commutation of, on day of relief from duty.

Certain officers on duty at the Army War College at Washington, D. C., were by special orders relieved from duty to take effect July 1, 1912, granted leaves of absence to take effect on being relieved from duty, and directed then to proceed to their proper stations.

Held, that the allowance of commutation of quarters is analogous to allowance of pay, and that the officers in question were entitled to commutation for the day they were relieved from duty.

(Comp. of the Treas., Apr. 16, 1913.)

TRANSPORTATION: Of the Army; Hire of means of transportation for officers engaged upon map work; Appropriation chargeable.

It was contemplated to order an officer of the Coast Artillery Corps to take station for fieldwork in the preparation of maps necessary in the military service in connection with which it would be necessary to perform local travel, both on land and water. A decision was desired from the Comptroller upon the following questions:

(a) Whether, in the case of officers (not receiving pay and allowances as mounted officers) engaged in the performance of duties assigned to them, or required to do local travel such as indicated above, payment may be made from public funds for the hire of necessary and suitable means of local transportation;

(b) Whether payment for such hire is authorized in the case of officers who receive pay and allowances as mounted officers when such local travel is required of them and the same can not properly be accomplished by the use of saddle horses; and also

(c) Whether payment is authorized for the hire of saddle horses, when necessary, for the use of mounted officers on such detached service where it would be an excess of expense to the Government for the transportation, care, and maintenance of the private mounts of those officers in order to have them available at place of duty.

The foregoing questions were framed upon the supposition that mileage was not to be paid for the travel for which the transportation was to be furnished.

Held, that under the provisions of the act of May 11, 1908 (35 Stat., 108), it is the duty of the United States to furnish the necessary mounts and horse equipments to officers below the grade of major entitled to be mounted, and that where it would be impossible or impracticable to provide such mounts, and the exigencies of the service should require the officer to be mounted, horses might be

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Liquidated damages; time of completion.

A contract was entered into to furnish all material and labor for the construction of a coal-storing plant to be completed within 12 calendar months from the date of the contract, with a provision for the payment of liquidated damages for delay beyond the period fixed. It contained a provision for additions of certain units to the plant at a specified unit price, it being contemplated at the time that Congress would appropriate more money, and that in such event the plant would be increased by the addition of such units. Congress made the appropriation, and additional units were ordered, amounting to much more than the original work. No provision was made for an extension of the time of completion on account of such additions. Delays were occasioned by the fault of the Government in commencing the work, but the same was carried to completion with reasonable diligence by the contractor.

Held, that where a building owner delays the contractor, the former can not enforce a time-limit stipulation for the completion of the work, but his conduct waives the same, giving the contractor a reasonable time in which to complete the work; that the delay of the Government in providing a site for the commencement of this work prevented the application of the provision for liquidated damages; and that it was evident that the limitation was intended to apply only to the original work, and not to the extensions then unknown to the parties. Judgment was therefore rendered for the amount of the liquidated damages, which had been retained.

(*Smith v. United States*, Ct. of Cls., No. 29849, Mar. 24, 1913.)

ENLISTMENT: Of a minor without consent of his parent or guardian; *habeas corpus* proceedings while held in confinement preparatory to delivery to the military authorities as a deserter.

A minor who enlisted in the Army without the consent of his parent or guardian deserted, was arrested while in desertion, and was being held for delivery to the military authorities. While so held, a writ of *habeas corpus* was sued out by himself and his mother jointly, claiming his release on the ground of minority.

Held, that a minor enlisting without the consent of his parents or guardian becomes a *de jure* soldier, and on his desertion from the service and subsequent arrest, and while being held for delivery to the military authorities for such offense, he is not entitled to be released upon *habeas corpus*, either upon his own application or that of his parent. *Held further*, in this case, that the mother of the soldier, having known of his enlistment for some time and not having taken any steps to have him released from his enlistment, virtually ratified said enlistment, and her application for his discharge after he had deserted from the service and had been arrested for the offense, should for this reason be denied.

(*Ex parte Dunakin*, 202 Fed. Rep., 290.)

Held, that the date of the officer's first flight after being detailed to this duty should be regarded as the date upon which his increase of pay and allowances should commence, and not the date of his reporting for duty; but that after his first flight, the additional pay should not cease if he holds himself in readiness for such duty and if, through no fault of his own, no flight can be made for a limited period.

(72-181, J. A. G., May 5, 1913.)

BURIAL EXPENSES: Of general prisoners; embalming remains for shipment.

On application for opinion as to whether or not any expense was authorized for embalming and preparing for shipment the remains of a deceased general prisoner, *held*, that there was no appropriation under the control of the War Department out of which such expense or charges for shipment to relatives of the remains of a general prisoner, could be paid, and that the ordinary means available at the post for the disposition of remains of deceased prisoners should be availed of.

(80-400, J. A. G., May 22, 1913.)

CLERKS AND EMPLOYEES: In the executive departments; promotions and demotions in the classified civil service.

Section 4 of the legislative, executive, and judicial appropriation act of August 23, 1912 (37 Stat., 413), provides that:

"The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil-service rules * * *."

Held, that the provision "all promotions, * * * or dismissals shall be governed by provisions of the civil-service rules," construed with reference to other provisions with which it is associated, was not then operative and would become effective only after the Civil Service Commission had established, with the approval of the President, a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia.

(6-112, J. A. G., May 10, 1913.)

CONTRACTS: Employment of alien labor upon Government work.

A part of the work for the construction of a water system at Schofield Barracks, Hawaii, was let, after advertisement, to a company which sublet the work of constructing the ditch, or a portion

struction of a portion of the Washington-Alaska Military Cable and Telegraph System. The specifications called for the delivery of certain wooden poles which were to be set into the ground and each supported by three braces in the form of a tripod, both poles and braces to be furnished and placed in position by the contractor. Payments were to be made as follows:

(a) Upon the delivery of braces at points where poles and tripods are to be set and the acceptance of the same in lots of 2,000 or more, at the rate of 75 cents per brace.

(b) Poles and tripods when set as per specification will be accepted in lots of 500 or more, and when accepted will be paid for at the rate of 75 cents per tripod.

(c) Clearance of right of way will be paid for upon final settlement and completion of the contract, and will be included in the final payment upon acceptance of the entire work of reconstruction.

On application for opinion as to whether or not the provisions of the eight-hour law applied, and as to whether the contract should contain the stipulation required by the act of June 19, 1912 (37 Stat., 137),

Held, that the purchase of braces and their transportation to the places where they were to be set up, fell within the following provision of the second section of the act of June 19, 1912:

"That nothing in this act shall apply to contracts for transportation by land or water * * * or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not;" but that the work of placing the poles and braces in position and of clearing the right of way was subject to the provisions both of the act of August 1, 1892 (27 Stat., 340), and the said act of June 19, 1912.

Held further, that the officer in charge of the work was in the best position to judge as to whether or not an extraordinary emergency sufficient to excuse noncompliance with the former act, or extraordinary conditions sufficient to excuse noncompliance with the latter act, existed in any particular case, and his honest and reasonable decision would not likely be reversed.

(32-300, J. A. G., May 17, 1913.)

EIGHT-HOUR LAW: Purchase of supplies; remodeling projectile hoists; water and electric lights; stevedoring.

Section 1 of the act of June 19, 1912 (37 Stat., 137), prescribed that every contract made for or on behalf of the Government involving the employment of laborers or mechanics shall contain a provision that no such laborer or mechanic doing any part of the work contemplated by the contract shall work more than eight hours in any one calendar day, with a provision for exacting a penalty for violation of the act. Section 2 excepts from the general provisions of the law contracts, among others—

"For the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not."

harbor at that place, the work must be prosecuted in compliance with the eight-hour law of August 1, 1892 (27 Stat., 340), as amended by the act of March 3, 1913 (37 Stat., 726).

(32-213.1, J. A. G., May 2, 1913.)

EIGHT-HOUR LAW: Extraordinary emergency; mobilization camp at Galveston, Tex.

On February 21 and 24, 1913, the Second Division of the Army was ordered to mobilize at Galveston, Tex., and it was necessary to make preparations for caring for the troops while stationed in that locality. Some of the troops were en route at the time the officer designated to make these preparations had reached the vicinity of Galveston, and certain classes of work had to be done quickly. This work was contracted for, and consisted of three classes, viz, arranging for water, building latrines, and building bridges. It appeared that the work could not have been completed in time by working the available force of laborers and mechanics only eight hours per day, and they, in fact, performed labor in excess of said limit.

Held, that the situation might be regarded as constituting an occasion of extraordinary emergency or condition within the meaning of the statutes limiting the employment of labor to eight hours per day on Government work, which would justify the employment of laborers and mechanics for more than eight hours per day.

(32-232, J. A. G., May 20, 1913.)

GRATUITY: On death of soldier; to whom payable; estate of deceased.

The act of May 11, 1908 (35 Stat., 108), as amended by the act of March 3, 1909 (35 Stat., 735), provides for the payment of a gratuity equal to six months' pay to the widow of an officer or of an enlisted man dying in the service from wounds or disease not the result of his own misconduct, or "to any other person previously designated by him," and further provides that—

"The Secretary of War shall establish regulations requiring each officer and enlisted man to designate the proper person to whom this amount shall be paid in case of his death."

Held, that the designation of an estate, whether the estate of the designator or the estate of another, is not contemplated by the statute.

(42-140, J. A. G., May 22, 1913.)

GRATUITY: On death of soldier; forfeiture by desertion.

A soldier absented himself without leave June 10, 1912, at Alcatraz Island, Cal., and was apprehended March 12, 1913, and delivered to the military authorities at Jefferson Barracks, Mo. He was admitted to the post hospital at Jefferson Barracks on March 20, 1913, and died in said hospital March 31 following, from a disease supposed to have been incurred during his absence, but not incurred through misconduct.

There was every indication to show that the soldier intended to desert the service, and no steps had been taken by the Government

the reservation "a description by metes and bounds of the lands herein authorized to be taken shall be approved by the Secretary of War."

A right of way was surveyed and a description by metes and bounds of the lands proposed to be occupied was approved by the Secretary of War according to the provisions of said act. It afterwards appeared that the lands approved for station purposes and sidings were disadvantageously located for Government purposes.

Held, that the Secretary of War, in approving the location as surveyed and described by metes and bounds, had exhausted his powers and could not subsequently approve a different location without authority of Congress; *held further*, that neither a revocable license nor a lease under the act of July 28, 1892 (27 Stat., 321), could be given for such purposes, as the same necessarily contemplated an occupancy of a permanent nature. 21 Op. Atty. Gen., 537.

(80-624, J. A. G., May 1, 1913.)

MILITIA: Of the District of Columbia; residence within the District.

The act of March 1, 1889, for the organization of the Militia of the District of Columbia, provides (25 Stat., 772):

"That every able-bodied male citizen resident within the District of Columbia, of the age of eighteen years and under the age of forty-five years, * * * shall be enrolled in the militia * * *."

The question having arisen as to the meaning of the words "resident therein" as applied to employees of the District of Columbia and of the several Federal departments therein—

Held, that the period of enlistment in the National Guard of the District of Columbia having been fixed by Congress at three years, employees of the District or of the Federal departments therein are eligible to enlistment in the National Guard of the District, so far as residence is concerned, if they actually have their places of abode in the District and intend to remain there indefinitely or for a period of not less than three years from the date of enlistment.

(58-811, J. A. G., May 26, 1913.)

MILITIA: Organization; conformity to that of the Regular Army; line and staff.

Section 3 of the militia act of January 21, 1903 (32 Stat., 775), as amended by section 2 of the act of May 27, 1908 (35 Stat., 399), provides *inter alia* that—

"On and after January 21, 1910, the organization, armament, and discipline of the Organized Militia in the Several States and Territories and the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War."

In a report by this office of June 29, 1909 (C. 14148-F), when the requirements of section 1114, Revised Statutes, prescribing brigade and division organizations, were held in abeyance as provided in

RESPONSIBILITY: Disposition of unserviceable property.

Paragraph 1039, Army Regulations, 1910, provides that china and glass ware belonging to the mess outfit of a military organization changing station shall, on the order of the commanding officer of the post or station, be inspected, and that all such ware which is found to be serviceable shall be turned over to the quartermaster for reissue, and all found to be unserviceable shall, after the authorized allowance of 5 per cent a quarter on account of breakage shall have been deducted, be destroyed and the money value thereof charged against the responsible officer. The report of the survey when approved by the commanding officer shall be final.

An inspection of china and glass ware of a company was ordered only a short time before said organization changed its station, and the same having been found to be serviceable, was turned over to the quartermaster of the post by order of the commanding officer of the post, who approved the survey as required by regulation, although the report thereof was imperfect. Afterwards a board of survey appointed for the purpose found similar property in the hands of the depot quartermaster, supposed to be the same as that which had been turned over to him, unserviceable.

Held, that under the circumstances the survey ordered by the commanding officer and approved by him should be taken as final, and that, if unserviceable property was found in the hands of the depot quartermaster, the same should be disposed of by him in the usual manner and thereupon he should be relieved from further responsibility.

(80-120, J. A. G., May 31, 1913.)

RETIRED OFFICERS: Active duty in certifying to the destruction of worn-out property.

A circular of the Quartermaster's Department required that the certificate of the accountable officer to the destruction of certain worn-out expendable property issued to troops should be supported by the certificate of a disinterested officer to the effect that the property had been destroyed in his presence. A recruiting officer of the Army desired to know whether a retired officer not on active duty could be allowed to make this certificate as the disinterested officer.

Held, that this certificate contemplated the performance of active duty in seeing to the destruction of the property, to which duty a retired officer, not on active duty, could not lawfully be assigned, and therefore such an officer could not make the required certificate.

(88-500. J. A. G., May 17, 1913.)

SERVICES: Gratuitous; accepting gratuitous transportation in relieving flood sufferers.

Several railway companies had participated in the movement of a special train from Washington, D. C., to Cincinnati, Ohio, for the Secretary of War and party in connection with the furnishing of relief to sufferers from the unusual floods in the latter State, and

QUARTERS: Commutation of, while awaiting sailing of a steamer; change of orders.

An officer of the Army was relieved from duty at his permanent station in time to permit him to proceed to Seattle, Wash., and there take passage on a steamer going to a post in Alaska to which he had been assigned. After his arrival in Seattle, and on the day before the sailing of the steamer on which he was to take passage, the officer's orders were changed by assigning him to a different station, and he was compelled to remain in Seattle for a period of time awaiting the sailing of another vessel going to his new station.

Held, that the officer acquired no right to quarters or to commutation thereof during the time he was compelled to await the sailing of his steamer to his new station, the delay being regarded as an incident of his travel.

(Comp. of the Treas., May 2, 1913.)

TRANSPORTATION: Release of carrier from liability; Government bill of lading.

A shipment of household goods of an officer changing station was made upon a regular form of Government bill of lading, which is subject to all the conditions and limitations of a uniform or standard bill of railroad companies and takes the same rates provided for shipments therein with the addition that—

“The shipment is at ‘owner’s risk,’ or released rates where the tariff provides lower rates on that account, and at ‘company’s risk,’ where the tariff makes no such provision.”

Two rates were provided for the transportation of household goods, one a lower rate where the value of the goods was limited or released to \$10 per hundred pounds, and the other a higher rate where there was no such release, and where the transportation company would be liable for the full value of the property in case of loss. It was claimed that at the time of the shipment a classification was effective which provided that where shippers desired reduced rates based upon agreed values—

“A statement to that effect must be written out or stamped in full upon the bill of lading at time of shipment and the shipper required to accept in writing the value expressed,” and that “where shippers do not desire to avail themselves of the reduced ratings based upon agreed value, notation of that effect should be inserted on the bill of lading by the agent at time of shipment.”

Held, following the interpretation heretofore placed upon the provisions of the Government bill of lading, that the shipment in question should be regarded as having been made at the reduced rates based upon a release of value and consequent release of liability of the transportation company to value required to secure reduced rates, and that the claim for the difference between the higher and the lower rate should be disallowed.

(Comp. of the Treas., May 21, 1913.)

TRAVELING EXPENSES: Civilian employees; expense of board and lodging at their homes while on temporary duty.

Certain civilian employees on temporary duty presented with their expense accounts subvouchers signed by their wives which included

board and lodging. It was understood that they were living at their homes at the time they were engaged on temporary duty. Under paragraph 744, Army Regulations, 1910, civilian employees in any branch of the military service are entitled to reimbursement of actual expenses when traveling under competent orders for—

“Cost of meals, and lodgings including baths, tips, and laundry work, not to exceed \$4.50 a day while on duty at places designated in the orders for the performance of temporary duty.”

Held, that civilian employees receive this reimbursement on the theory that they continue in a traveling status, and that by presenting vouchers signed by their wives it would appear that they had abandoned this status. The payment of expense accounts of such employees supported by receipts signed by their wives for board and lodging was, therefore, unauthorized.

(Comp. of the Treas., May 17, 1913.)

BULLETIN 23.

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No. 23. }

WAR DEPARTMENT,
WASHINGTON, *July 15, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of June, 1913, and of certain decisions of the Comptroller of the Treasury, and of the courts, and of opinions of the Attorney General, is published for the information of the service in general.

[2054671, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Lump-sum; payment for personal service; transfer from a statutory position.

It was proposed to transfer a clerk in the War Department receiving a statutory compensation of \$1,800 per annum to a position newly created involving the performance of essentially different duties at a compensation of \$3,600 per annum, to be paid from lump-sum appropriations. Section 7 of the general deficiency act of August 26, 1912 (37 Stat., 626), provides:

“Nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation at a rate of compensation greater than such specific salary.”

Held, that the above provision was intended only to prevent the transfer from a position with a specific salary or compensation to another position paid from a lump-sum appropriation at an increased compensation where the duties or services required were the same or similar, but that where the duties are essentially dissimilar such transfer might be made without violating the provisions of said act, and that the proposed transfer might lawfully be made. Decision of Comptroller of the Treasury, June 6, 1913.

(5-075, J. A. G., June 13, 1913.)

Similarly *held*, that a clerk at a specific salary in the Department of Agriculture might be transferred to a position in the War Department at an increased compensation paid from a lump-sum appropriation where the duties to be performed were essentially different.

(5-075, J. A. G., June 13, 1913.)

was qualified by the clause "or so much thereof as may be necessary," the effect was to set aside only so much from the general appropriation as might be needed for the specific purpose, leaving the balance available for the other purposes of the appropriation.

(5-249.2, J. A. G., June 3, 1913.)

BONDS: Justification and sufficiency of sureties on bidder's guarantees and contractors' bonds; duplicate certificates.

The Chief of the Quartermaster Corps submitted the question as to whether a certificate of the clerk of a United States court as to the sufficiency of sureties on bidders' guaranties and contractors' bonds was required to be placed on more than one of the instruments where the contracts are required to be executed in triplicate, or whether it would be sufficient if the certificate should be attached to one number with a reference thereto on the others.

Held, that the affidavit of justification and certificate of sufficiency of sureties to a contractor's guaranty or bond are no part of the instrument (Dig. J. A. G., 1912, p. 195), and that there was no legal objection to requiring the certificate to be placed only upon one number of the guaranty or bond, reference being made thereto on the other numbers.

(12-311, J. A. G., June 5, 1913.)

CONTRACTS: Opening of bids; accepting a proposal after the time fixed for receipt of same.

A contract was to be let for remodeling a building, and the time for opening proposals therefor was fixed at 11 a. m. The lowest bid was received 7 minutes after the time fixed for opening, but 13 minutes before the bids were actually opened. It was not claimed, nor did it appear, that the lowest bidder derived any advantage from the delay in submitting his bid.

Held, that under these circumstances the lowest bid might be received and the contract awarded to the lowest bidder, the case being one where the strict requirements of the regulations might be waived.

(76-251, J. A. G., June 12, 1913.)

DISCIPLINE: Prisoner awaiting trial; punishment.

An enlisted man of the Army under confinement awaiting trial was subjected to solitary confinement on bread and water for refusal to work, by order of the post commander, who was of opinion that discipline demanded immediate action, and that his action was justified by the Manual of Guard Duty. Paragraph 343 of said manual prescribes that:

"A general prisoner who refuses to work may, for his first offense, be closely confined and deprived of his next meal, but food will be allowed him as soon as he consents to resume work."

Paragraph 358 of the same manual provides that:

"The foregoing rules will be enforced with reference to garrison prisoners so far as applicable."

college of the United States such officer "shall receive from the annual appropriation for the support of the Army, the same travel allowances and quarters or commutation of quarters to which an officer * * * of the Regular Army would be entitled for attending such school or college under orders from proper military authority."

Upon arrival at the school these officers were assigned to and occupied public quarters, but afterwards of their own volition moved out of them and provided their own quarters, apparently believing that they were entitled either to commutation of quarters or quarters in kind as they might elect.

Section 16 of General Orders No. 128, W. D., 1911, provided with reference to officers of the militia attending such schools that "militia officers can not be furnished with quarters in kind," and paragraph 341 of the Regulations of the War Department for the Government of the Organized Militia contains substantially the same provision.

Held, that there is no authority for the rule that militia officers so circumstanced can not be furnished quarters in kind, and that these officers, having been furnished quarters in kind, were not entitled to commutation thereof, as an Army officer similarly situated would not have been entitled to such commutation.

(58-411.1, J. A. G., June 7, 1913.)

MILITIA: Rental of rifle ranges purchased for, to the United States and to private parties; disposition of proceeds.

On submission of the question for opinion as to the right of a state to charge the United States a rental for the use of a rifle range purchased for the use of its Organized Militia, and of the right of the state or of the United States to lease such ranges.

Held, that where a state rifle range was purchased from a Federal allotment for "promotion of rifle practice" under section 1661, Revised Statutes, and the title thereto vested in the United States, there was no legal authority for its leasing by the state to the United States and the payment of rental therefor.

Held further, that while these ranges are the property of the United States, and while they are under the immediate control of the militia authorities of the state, they are subject to the general authority of the War Department, and that the Secretary of War, if all or any portion of any such a range shall not be needed for the use of the state militia, may authorize its lease under the provisions of the act of July 28, 1892 (27 Stat., 321), and that the funds derived from such leasing should be deposited in the Treasury of the United States to the credit of miscellaneous receipts.

(58-520, J. A. G., June 2, 1913.)

OFFICIAL CORRESPONDENCE: Telegram in relation to the purchase of a mount.

An officer of the Army required by law to be mounted at his own expense, was directed by his commanding officer to purchase a suitable mount for his use as field officer. He took the matter up with a purchasing officer of the Quartermaster Corps, and the latter sent

the court and proceeded with the work under the contract, and a considerable amount became due for work performed. Since the order of the court appointing the managing partner the other partner went into bankruptcy, and a receiver in bankruptcy was appointed, who informed the commanding officer of the arsenal that he had determined that he had no right to complete the contract and would act accordingly.

Held, that the bankruptcy of a partnership dissolves the firm (30 Cyc., 654), and where the interest of one partner is transferred in bankruptcy or insolvency, the right to the control and disposition of the firm assets vests in the other partners (30 Cyc., 664).

Held further, that it was proper for the commanding officer to permit the managing partner to complete the work under the contract, and to draw checks in payment for the work done in the name of the firm and deliver the same to the managing partner, who had ample authority to indorse the firm name.

(76-331.23, J. A. G., June 2, 1913.)

POST EXCHANGE: Contracting with the Government to furnish electric light.

The post exchange at a certain military post operated for its own use a small electric plant and furnished light to several buildings. It was desired to know whether the exchange could be paid for light furnished to officers pursuant to regulations.

Held, that there was no reason why a post exchange might not enter into a contract with the Government for furnishing electric current for lighting the authorized allowance of quarters for officers on duty at the post.

(40-041, J. A. G., June 19, 1913.)

PUBLIC BUILDINGS: Restrictions on expenditures upon public buildings or military posts.

The act of February 27, 1893 (27 Stat., 484), provides:

"Hereafter no expenditures exceeding five hundred dollars shall be made upon any building or military post, or grounds about the same, without the approval of the Secretary of War for the same, upon detailed estimates of the Quartermaster's Department * * *."

It was proposed to amend paragraph 718, Army Regulations, 1910, reading "Nor will any expenditures exceeding \$500 be made upon any building or grounds at any post, fort, arsenal, or depot without the approval of the Secretary of War and upon detailed estimates submitted to him," so as to exclude arsenals therefrom. It was further proposed that the Secretary of War should delegate authority to act in his name in the approval of expenditures upon public buildings and grounds within certain limits of cost, to the heads of the staff departments.

Held, that although the provision placing restrictions upon the amount to be expended upon buildings or military posts was contained in the part of the law appropriating for barracks and quarters under the control of the Quartermaster's Department, the lan-

Held, that a regimental or company exchange, being organized along the same lines and for the same purposes as a regular post exchange, although not recognized as a governmental agency by regulations, might properly be regarded as an extension of the post exchange, and that the bill in question might be settled the same as if the purchase had been made from a post exchange.

(40-100, J. A. G., June 19, 1913.)

STENOGRAPHIC REPORTER: Employment of an enlisted man.

An enlisted man at a post was employed as stenographic reporter of a board appointed to examine into and report upon the mental status of a general prisoner, and he presented a bill for his services at the rate of 5 cents per 100 words. The act of August 24, 1913 (37 Stat., 575), provides:

“That hereafter enlisted men may be detailed to serve as stenographic reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards, and while so serving shall receive extra pay at the rate of not exceeding five cents for each one hundred words taken in shorthand and transcribed, such extra pay to be met from the annual appropriation for expenses of courts-martial, and so forth.”

Held, that as the law only provided for employing enlisted men as stenographic reporters and paying extra compensation therefor when detailed to serve as reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards, which designations did not embrace a board of the character in question, there was no authority for paying for this extra service.

(72-237, J. A. G., June 26, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ABSENCE: Leave of, to per diem employees at the United States Military Academy; daily employees.

The Secretary of War requested a decision whether, if regulations were promulgated by his department providing for a leave of absence with pay to employees at the Military Academy when their compensation is fixed either on a per annum, a per month, or a per diem basis, they could be paid for such absence as might be authorized by the regulations.

Held, that the granting of a leave of absence with pay to employees whose compensation is fixed by law is a matter within the discretion of the Secretary, but for those whom he is authorized to employ under lump-sum appropriations, the compensation and terms of employment are matters of agreement between the parties; that where the compensation is on a per annum basis, there is a degree of permanency of employment which makes proper the exercise of executive discretion in agreeing with the employee for a leave of absence with pay, and the same is true with regard to those employed on a per diem basis where the rate of pay merely measures the com-

Service at a salary of \$2,000 per annum of a clerk in the Bureau of Indian Affairs holding a position with a salary fixed by law at less than \$2,000 per annum.

The appropriation "General expenses, Indian Service, 1913," reads in part:

"For pay of special agents at two thousand dollars per annum; for traveling and incidental expenses of such special agents, including sleeping-car fare, and a per diem of three dollars in lieu of subsistence when actually employed on duty in the field or ordered to the seat of government; * * * for pay of employees not otherwise provided for; * * * \$125,000." (Act of Aug. 24, 1912, 37 Stat., 521.)

Section 3 of the act of August 23, 1912 (37 Stat., 413), contains a similar provision to that found in section 7 of the general deficiency act of August 26, 1912, *supra*, limited to the appropriations in lump sum contained in the act, and the compensation restricted to the rates paid during the fiscal year 1912.

Held, that in so far as the employment of special agents were concerned, the appropriation for general expenses of the Indian Service was not a lump-sum appropriation, and that the appointment of a clerk in the Bureau of Indian Affairs holding a position with a salary fixed at less than \$2,000 per annum, as a special agent at \$2,000 per annum, was not forbidden by the law, since it would be a transfer to a position the compensation of which was fixed by law, and which therefore was a statutory position and not one paid from a lump-sum appropriation. Overruling 19 Comp. Dec., 613.

The further question was submitted as to whether a clerk in the Bureau of Indian Affairs holding a statutory position could be transferred to a clerkship or a superintendency in the field service at an increased salary to be paid from a lump-sum appropriation, not in excess of that paid for similar services during the fiscal year 1912. The position held in the bureau at Washington had no relation or similarity so far as duties were concerned to the position in the field.

Held, that a *bona fide* transfer is not prohibited from a position at a specific salary to a position in the field paid from a lump-sum appropriation at a higher salary, the latter position having duties not in fact the same or similar to those of the former and the rate of compensation not being in excess of the rates specified in the first part of section 7 of the act of August 26, 1912, which fixes a limit to the pay from a lump sum appropriation for personal services; and that the transfer proposed could be made, subject to the limitations stated.

(Comp. Geo. E. Downey, June 6, 1913.)

GRATUITY: Six months' pay to representative of deceased soldier; designation of beneficiary.

The act of May 11, 1908 (35 Stat., 108), as amended, provides that upon the death of an officer or enlisted man in the active service from wounds or disease not the result of his own misconduct, an amount equal to six months' pay at the rate the soldier was receiving at the time of his death shall be paid to his widow or to any other

Held, that as there was no authority shown for the hire by the soldier of private quarters for his use, the claim must be treated as one for commutation, and that commutation of quarters was forbidden by the proviso contained in the appropriation "Barracks and quarters" in the Army appropriation act, which provides:

"That no part of the moneys appropriated shall be paid for commutation of fuel or quarters to officers or enlisted men." (Act Aug. 24, 1912, 37 Stat., 581.)

The claim was therefore disallowed.

(Asst. Comp. W. W. Warwick, June 20, 1913.)

QUARTERS: Furnished in kind; temporary duty.

An officer while on duty at a post with troops was assigned to temporary duty in the office of the judge advocate of the division at the headquarters near by where there were no quarters available for him. He formally relinquished his right to quarters which he had previously occupied and requested that his family be allowed to retain the occupancy of the same during his assignment to the temporary duty. His family continued to occupy his quarters and the officer himself occupied them at night, going to and returning from his place of duty at his own expense. He claimed commutation of quarters while on this temporary duty.

Held, that the officer having actually occupied public quarters during the entire period covered by the claim, either by right or by courtesy, he was not entitled to commutation therefor, and the fact that the quarters he occupied at his prior station were not needed for other officers was immaterial.

Held further, that this officer's case was distinguished from that of Col. Glenn (19 Comp. Dec., 379) in that said officer's new station was so far removed from his old station that he could not share the quarters occupied by his family through the courtesy of the commanding officer of the old station.

(Asst. Comp. W. W. Warwick, June 13, 1913.)

TIME: Computation of, for purposes of pay; pay for the 31st day of a month.

An officer of the Medical Reserve Corps was called into active service pursuant to the act of April 23, 1908, for only one day, that being the 31st day of the month. Section 9 of said act (35 Stat., 68), provides:

"That officers of the Medical Reserve Corps when called upon active duty in the service of the United States, as provided in section eight of this act, shall be subject to the laws, regulations, and orders for the government of the Regular Army, and during the period of such service shall be entitled to the pay and allowances of first lieutenants of the Medical Corps * * *."

OPINIONS OF THE ATTORNEY GENERAL.

(Digests prepared in the office of the Judge Advocate General.)

EIGHT-HOUR LAW: Public-building contracts; appropriations made before the passage of the act.

The act of June 19, 1912, commonly known as the eight-hour law, contains at the end of section 2 the following qualification (37 Stat., 138):

"Nothing in this act shall be construed to * * * apply to contracts which have been or may be entered into under the provisions of appropriation acts approved prior to the passage of this act."

Held, that where Congress has fixed the limit of cost of a public building and made a partial appropriation therefor prior to June 19, 1912, but subsequently thereto has increased the limit of cost, the contract for the erection of said building, whether entered into before or after the time when said limit of cost was so increased, was excepted from the operation of section 1 of the eight-hour law of June 19, 1912 (37 Stat., 137).

(30 Op. 150, Apr. 19, 1913.)

EMPLOYEES: Compensation act; jurisdiction of the Secretary of Labor.

The act of May 30, 1908 (35 Stat., 556), providing for compensation to employees for injuries received in the Government service under certain conditions, contains the provision that the final decision of claims arising under said act shall lie with the Secretary of Commerce and Labor, under regulations prescribed by him. Section 3 of the act of March 4, 1912 (37 Stat., 737), creating the Department of Labor, provides that certain named "offices, bureaus, divisions, and other branches of the public service," then and theretofore under the jurisdiction of the Department of Commerce and Labor, and all that pertain to the same, including the Bureau of Labor and the office of the Commissioner of Labor, shall be transferred from the Department of Commerce and Labor to the Department of Labor, and shall thereafter remain under the jurisdiction and supervision of the last-named department.

Held, that final authority to determine claims arising under the workmen's compensation act of May 30, 1908, *supra*, as amended, rests in the Secretary of Labor.

(30 Op. 145, Apr. 3, 1913.)

PUBLIC PROPERTY: Leasing of water power created by the construction of Government works.

The United States erected a lock and dam on the Black Warrior River, Ala., and the question arose as to the right to lease the water power incidentally created thereby.

Held, that, assuming that the Federal Government had the right to dispose of surplus water created by a dam erected by it in improving the navigation of a navigable water of the United States within a State, it was manifest that, under the Constitution (Art. IV, sec. 3), such right of disposal resided solely in Congress, and that the Secretary of War had no right, under existing legislation, to enter into an agreement for leasing water power created by said lock and dam.

(30 Op. 154, Apr. 21, 1913.)

4. Sections 6, 7, 8, and 9, of chapter 14 of the code, authorizing such arrest and imprisonment, do not violate the provisions of the State and Federal constitutions, inhibiting deprivation of liberty without a trial by jury, and are constitutional and valid.

5. Being so, such an arrest, detention, and imprisonment, by virtue of said statute, are effected by due process of law within the meaning of section 10 of Article III of the Constitution of this State and the fourteenth amendment to the Constitution of the United States.

(*In re Mary Jones and others*, Mar. 21, 1913.)

PUBLIC PROPERTY: Recovery of property alleged to belong to the United States.

An action of replevin was brought for the recovery of certain soldiers' clothing seized under the orders of officers of the United States Army. It was stipulated that certain of the property belonged to the plaintiff, but that other of said property, "consisting of clothes and military outfit," had been furnished prior to said seizure by the United States to certain of its soldiers. Aside from this stipulation, the plaintiff offered no evidence of title or right to possession of the property.

Held, that an admission that certain clothing was "furnished" by the United States to its soldiers, raised the presumption that the United States then had title thereto, and such title was not shown to have been divested merely because the clothing was so furnished.

Held further, that the right of recaption is a part of the common law of the Philippine Archipelago, that it belongs to any citizen under proper restrictions, and that *a fortiori* it belongs to the sovereign power and its agents. It was accordingly *adjudged* that the plaintiff should recover none of the property described in the stipulation as having been furnished by the United States to certain of its soldiers.

(*Tan Te v. J. Franklin Bell et al.*, Court of First Instance, District of Manila, Dec. 14, 1912.)

It was desired to increase the compensation of the foreman in the sponging and shrinking plant at Philadelphia, Pa., beyond the amount he had received during the preceding fiscal year. He was described as a foreman of laborers but was also described as the only employee of his class.

Held, that while under the eight-hour law of August 1, 1892 (27 Stat., 340), a foreman of laborers was held not to come within the terms "laborers and mechanics" as used in said statute, the said law being penal in its nature (Dig. Op., J. A. G., 1912, p. 593, VII), a foreman within the meaning of section 4 of the act of March 4, 1913, should be classed with the particular employees whose work he is called upon to oversee, and that such an employee was excepted from the general provisions of section 7 of the act of August 26, 1912. *Held*, therefore, that the proposed increase could lawfully be made. (5-075, J. A. G., July 24, 1913.)

BURIAL EXPENSES: General prisoners.

On application for opinion as to whether the cost of burying a general prisoner could be paid from the appropriation "Contingencies of the Army," attention being invited to the opinion of this office of May 22, 1913 (W. D. Bul. No. 18, p. 4, c. s.), to the effect that there is no appropriation under the control of the War Department from which there could be paid the expenses of preparing the remains of a deceased general prisoner for shipment to his relatives, it was explained that the opinion cited had reference to the expenses incident to the preparation of the remains of a general prisoner for shipment to his relatives, and did not extend to the necessary expenses of preparing the body for burial at Government expense.

Held, that in the absence of a specific appropriation available for the purpose, and as the expense was incurred as an incident to the administration of the Army, the same was properly chargeable to the appropriation for "Contingencies of the Army," reference being made to the decision of the comptroller published in 11 Comptroller's Decisions, 789, 790. *Held further*, that the question was simply one of the decent and proper disposition of the remains of a general prisoner, the possession of which is cast upon the Government; and that the quartermaster in the interest of economy would be justified in making any reasonable arrangement with the relatives of the deceased whereby the cost of this service to the Government might be reduced.

(30-824.2, J. A. G., July 29, 1913.)

CIVIL SERVICE: Reduction or discharge of honorably discharged soldiers for inefficiency; system of efficiency ratings.

Section 4 of the legislative, executive, and judicial appropriation act of August 23, 1912 (37 Stat., 413), provides that—

"The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments of the District of Columbia based upon records kept in each department and inde-

DETACHED SERVICE: Detail to the Philippine Constabulary; rank.

The Army appropriation act of August 24, 1912 (37 Stat., 571), provides generally that no officer holding a commission in the line of the Army below the rank of major who "shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company, of that branch of the Army in which he shall hold said commission," shall be detached or be permitted to remain detached from said organization for duty of any kind; but it is further provided therein, as follows:

"Nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty * * * in the Philippine Constabulary until the first day of January, nineteen hundred and fourteen."

The further provision was added:

"And hereafter no officer holding a permanent commission in the Army with rank below that of major shall be detailed * * * as chief or assistant chief (director or assistant director) of the Philippine Constabulary and no other officers of the Army shall hereafter be detailed for duty with the said constabulary, except as specifically provided by law."

Held, that the two provisions limiting details were distinct, the first prescribing a rule of eligibility based on service and which was not to become effective as to the Philippine Constabulary until January 1, 1914, and the other prescribing a rule of eligibility based upon rank, which became immediately effective. *Held, therefore*, that a captain of cavalry could not be detailed as chief of the Philippine Constabulary with the rank, pay, and allowances of a brigadier general.

(92-412, J. A. G., July 3, 1913.)

DISCHARGE: Of enlisted men; discharge without honor; finality.

A soldier plead guilty in a State court to murder in the second degree and was sentenced to imprisonment in a State prison for 10 years. He was thereupon discharged from the Army without honor. In the State prison he developed mania and mental aberration, but after an operation by which a depressed portion of his skull was raised, these symptoms disappeared and he became rational. The depression was the result of an accident which occurred to him while in the service. He applied to have the discharge without honor substituted by an honorable discharge upon the ground of his mental aberration which was due to the skull depression.

Held, that it could not be assumed that if the Secretary of War had had all the facts before him that then appeared, his action would have been other than it was; but *held further*, that the Secretary having officially acted in the matter, his action became final and could not then be revoked.

(28-128 J. A. G., July 2, 1913.)

INDIANS: Support of; cutting and using hay from a military reservation.

It was requested on behalf of the Cree Indians that they be permitted to cut hay upon a military reservation for their use during

Held, that as the law provided that acting dental surgeons should have the same official status as contract dental surgeons had at the time of the passage of the act, and as such contract dental surgeons were employed for a term of three years under a contract which might be sooner annulled for certain reasons specified in the Army Regulations, the appointment of acting dental surgeon as now provided by law might be annulled or revoked in like manner, and that if the services of this particular acting dental surgeon were such as to bring him within any of the reasons for which the contract of a contract dental surgeon might have been annulled, his appointment might be revoked and his services dispensed with.

(6-227.3, J. A. G., July 18, 1913.)

MILITARY RESERVATIONS: Erection of a memorial cannon thereon.

A chapter of the Daughters of the American Revolution desired permission to erect a memorial, consisting of a cannon weighing about 2,000 pounds, suitably inscribed and mounted, upon a portion of a United States military reservation, for the purpose of commemorating a historical event which took place near that spot during the American Revolution. The work would not interfere with the use of the reservation for military purposes.

Held, that, if such were the object, the memorial would serve a public purpose and would not be in the nature of a permanent improvement in which private rights might be acquired, and that permission might be granted for its erection and maintenance. It was *advised*, however, that the design and inscription should be subject to the approval of the Chief of Engineers.

(80-438, J. A. G., July 11, 1913.)

MILITARY TELEGRAPH LINES: Charging tolls on messages from other departments of the Government.

The act of May 26, 1900 (31 Stat., 206), establishing the Washington-Alaska military cable and telegraph system, provides:

“For the purpose of connecting headquarters, Department of Alaska, at St. Michael, by military telegraph and cable lines with other military stations in Alaska. * * *: *Provided*, That commercial business may be done over these military lines under such conditions as may be deemed, by the Secretary of War, equitable and in the public interests, all receipts for such commercial business shall be accounted for and paid into the Treasury of the United States * * *.”

Section 2 of the act of October 1, 1890 (26 Stat., 653), provides that—

“The Chief Signal Officer shall have charge, under the direction of the Secretary of War of * * * the construction, repair, and operation of military telegraph lines * * *.”

Held, that the effect of the language of the above acts was to make said lines an instrumentality of the War Department, and that they can not be transferred to another department without legislative authority. *Held further*, that there was nothing in the law that

venience, and not a Government establishment in Washington within the purview of said statute, and that the contract with the Quartermaster Corps for supplying ice to said hospital was binding, and vouchers for ice delivered thereunder should be prepared at the price named in said contract. (Comp. Dec., June 20, 1913.)

(14-120.1, J. A. G., July 22, 1913.)

QUARTERS: Certificate as to occupancy.

On the question raised as to the proper certificate as to occupancy of quarters, reference being made to the decision of the Comptroller of the Treasury of May 26, 1913 (W. D. Bul. No. 23, p. 16, c. s.), where an apartment was occupied by three officers, the apartment containing three living rooms, three bedrooms, one bathroom, one long hallway, one dining room, one kitchen, one maid's room, one pantry, and one storeroom.

Held, that, assuming that each officer occupied exclusively one living room and one bedroom and that the other rooms were occupied in common for their joint use, where officers furnish their own quarters and bear their share for the rental of rooms occupied in common by them, the occupancy should be divided among the several officers, and that if the officer in question has occupied two rooms exclusively, and has used three other rooms of sufficient size to count as quarters in common with two other officers, he would be justified in certifying that he had occupied his full allowance of three rooms as quarters; but, in view of the fact that the auditor had indicated that only such rooms as are occupied by an officer exclusively shall be included in the certificate, an explanation or statement should accompany the certificate showing the exact condition of the occupancy in common with the other officers.

(72-313, J. A. G., July 30, 1913.)

NOTE.—This case, where certain officers leased an entire apartment, jointly occupying certain rooms, should be distinguished from the cases covered by the decisions of the assistant comptroller dated July 30, 1913, post, where the rooms referred to as occupied in common with others were the public rooms of a club or hotel, so that the same could not be considered as the quarters of the officers.

RETIREMENT: Advanced grade; allowances.

An officer of the United States Army with Civil War service was retired from active duty as a colonel, June 7, 1912, after more than 46 years' service. On June 12, 1912, the Senate confirmed his nomination for advancement in grade, and, on June 21 following, he was by the President placed upon the retired list with the rank of brigadier general to date from June 7, the date of his retirement. He had personal effects to the amount allowed by Army Regulations for a colonel transported to his home at public expense when he was retired, and he requested a decision as to whether or not he was entitled to transportation of baggage to the amount allowed a briga-

TRAVELING EXPENSES: Army officers on civil business as members of a commission; appropriation chargeable.

Joint resolution No. 40 of August 9, 1912 (37 Stat., 641), directed the Secretary of War to cause an investigation to be made of the claims of American citizens and others domiciled in the United States for certain injuries received within the boundaries of the United States from the operations of Federal or insurgent troops of Mexico in the course of the insurrection in that country during the year 1911. For the purpose of such investigation the resolution authorized the Secretary to appoint "a commission of three Army officers," which commission was given authority to subpoena witnesses, administer oaths, etc., and was required to report to Congress through the Secretary of War its findings of fact upon each claim, together with its conclusions as to the justice and equity thereof, and as to the proper amounts of compensation or indemnity to be paid. Subsequently the sum of \$5,000 was appropriated by Congress "to carry out" the provisions of said resolution.

Held, that for travel performed under orders by members of said commission in connection with its business, only mileage and not actual traveling expenses could be paid to said officers, and that the accounts should be submitted to the Auditor for the War Department upon that basis. *Held further*, that the mileage should be paid from the special appropriation made for the payment of the expenses of the commission.

(94-210, J. A. G., July 23, 1913.)

VOLUNTARY SERVICES: Payment for repairs of railroad siding belonging to the Government.

A railroad side track belonging to the Government and located upon a Government military reservation was in bad condition, and the railroad company with whose lines it connected repaired the same without any request by, but without objection from, the military authorities.

Held, that as the work was voluntarily rendered, and as there was no contract either express or implied upon the part of the Government to pay for the said repairs, there was no authority for making payment for the services rendered.

(76-030, J. A. G., July 15, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Heating and plumbing fixtures; Public buildings.

By act of August 24, 1912 (37 Stat., 582), the sum of \$10,000 from the appropriation for "Barracks and quarters" was authorized to be expended for the construction of a building for instruction purposes for the post of Fort Leavenworth, Kans.; and by act of March 4, 1913 (37 Stat., 865), an additional amount of \$5,000 was appropriated for

necessary to remove was caused by the fact that the rock surface was very irregular and overlaid with hard material so that it was impossible to determine its surface by the ordinary methods of rod boring. The quantities given in the specifications were only approximate and were expressly stated to be but an estimate, and the contract and specifications contained a provision that bidders were expected to examine the work and to decide for themselves as to its character and make their bids accordingly, as the United States did not guarantee the accuracy of the description. Another paragraph of the specifications provided that—

“No allowance will be made for the failure of a bidder or of a contractor to estimate correctly the difficulties attending the execution of the work.”

It was further provided that no charge for inspection or superintendence would be made, after the expiration of the contract for time lost—

“On account of the unusual freshets, ice, rainfall, or other abnormal forces or violence of the elements * * * or other unforeseeable cause of delay arising through no fault of the contractor and which actually prevented such contractor from commencing or completing the work * * * within the period required by the contract.”

Held, that a statement of the approximate quantities of material set out in the specifications was distinctly not a warranty but at most a mere estimate (*Griefen v. United States*, 43 Ct. Cls., 107), and the fact that there was more ledge rock to remove than either the contractor or the Government had expected was not an unforeseeable cause of delay within the meaning of the contract. *Held, therefore*, that the contractor should be charged with all the cost of inspection, etc., for delay beyond time for completion occasioned by the necessity for the removal of the quantity of ledge rock above the amount mentioned in the specifications.

(Asst. Comp. W. W. Warwick, June 30, 1913.)

CONTRACTS: Where Government assists contractor who is not in default.

A contract for levee work provided that the price per yard should include all costs for clearing the foundation. After clearing the foundation the work was delayed by excessive rains; and in order to expedite the work in view of approaching floods and without awaiting any default or delinquency on the part of the contractor, the contracting officer, with the assent of the contractor, placed a quantity of materials on the site cleared by the contractor at a cost of \$357.27 less than the amount which the contractor would have received for the same quantity of materials under the terms of the contract. *Held*, that the contract, as modified by the contractor's agreement that the Government should aid in the work, should be interpreted so as to give him the contract rate per yard for all materials placed in the work, deducting therefrom the cost to the Government for the work done by it.

(Asst. Comp. W. W. Warwick, July 7, 1913.)

BULLETIN 29.

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No. 29. }

WAR DEPARTMENT,
WASHINGTON, *September 10, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of August, 1913, including one opinion for July, 1913, not heretofore published, and of certain decisions of the Comptroller of the Treasury and of opinions of the Attorney General and of one court decision, is published for the information of the service in general.

[2054671 A.—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

H. O. S. HEISTAND,
Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE ON SICK LEAVE: Status of officer on sick leave without any regular station.

An officer of the Medical Reserve Corps who was ill with heart trouble was transferred from Benicia Arsenal, Cal., to the Letterman General Hospital. It became necessary to replace him at the arsenal by another medical officer and, owing to the limited accommodations for officers at that station, to relieve him from further duty to make room for the family of his successor. No orders were issued assigning him to a new station. He requested that, unless the order relieving him from duty at the arsenal entitled him to commutation of quarters, thereafter quarters be provided in San Francisco for his family, which had been occupying the quarters assigned to him at Benicia Arsenal; that his household goods and two private mounts at Benicia Arsenal be shipped by the quartermaster to the Letterman General Hospital; and that some quartermaster in the neighborhood be authorized to issue forage for said mounts after their arrival.

Held, that this officer's status was that of an officer who had been relieved from duty at his station without an assignment to a new station, and was analogous to that of an officer on sick leave without any regular station, and that hence he was not entitled to commutation of quarters; that there was no authority of law or regulations under which shipment of his household goods and private mounts could be made as requested, nor could forage be furnished under his present status; and that in view of the fact that he had

scows, and dredges were not laborers or mechanics within the meaning of the eight-hour law of August 1, 1892 (27 Stat., 340), but belonged in the distinctive class of seamen, deck hands, and stokers employed upon dredges, being a part of the crews of the dredges, must also be placed under the same classification; that under the terms of the act of March 3, 1913, *supra*, they could not be considered as persons employed to perform services similar to those of laborers or mechanics in connection with dredging, as there was, legally speaking, no similarity between such services; and that the law, having sharply distinguished the crew from laborers and mechanics, had by the same token distinguished between the services of the two classes, and, furthermore, that the proviso of said act limiting its application to persons employed and directly operating dredging or rock-excavating machinery or tools excluded from the benefits of the act all persons not so employed, including deck hands and stokers.

Held, further, that for the reasons given the district engineer officer had authority to require deck hands and stokers of the crews of dredges employed by him to remain on the dredges for more than eight hours in a calendar day, and that he was legally justified in dismissing those deck hands and stokers who refused to obey his directions.

(32-221, J. A. G., Aug. 29, 1913.)

EIGHT-HOUR LAW: Telegraph operators not laborers or mechanics.

Upon the question submitted as to whether a telegraph operator is a laborer or mechanic within the meaning of the eight-hour statute,

Held, that it may be said without hesitation that he is not a mechanic; that, as his manual labor is attended by a far greater amount of technical skill and brain exertion, he may be considered not as one who labors principally with his physical powers, but as one whose services consist mainly of work requiring mental skill; that the element of mental skill and brain power so largely enters into his work that the term "laborer" used in the law does not apply to him, and that he is not, therefore, either a mechanic or a laborer within the meaning of the eight-hour statute.

(32-223, J. A. G., Aug. 13, 1913.)

MILITARY RESERVATIONS: Right of the United States to require a telegraph company to remove its pole line from an avenue which had formerly extended through lands now occupied by the reservation and which was subsequently closed.

A municipality had granted to a telegraph company a franchise to extend a telegraph line along an avenue of the city, which avenue adjoined on one side a military reservation and marked the limits of the reservation in that direction. Subsequently the United States acquired a tract adjoining this avenue on the other side thereof from the reservation for an addition to the reservation, upon which the old avenue was closed and a new avenue was opened up

PUBLIC PROPERTY: Loss of, due to fault of officer, agent, or employee.

Upon a question as to the legal right of the department to withhold from the pay of the superintendent of the Antietam battlefield the sum of \$110 to cover the value of the Government property for which said superintendent was responsible and which, it was alleged, had been destroyed by fire as the result of his misconduct,

Held, that it is an established rule that in an action by a servant to recover wages the master may show, by way of set-off or defense to the claim, injuries to his property caused by the servant's negligence, misconduct, or lack of due diligence in the performance of his duties; and that acceptance of the position of superintendent of the Antietam battlefield served to establish the relation of employer and employee, or master and servant, between the Government and the incumbent of the position, and justified the official charged with supervising and paying said superintendent in invoking the foregoing rule if, through the neglect of the latter, public property was damaged or destroyed;

Held further, that the superintendent of the Antietam battlefield was a civilian employee within the meaning of paragraph 699, Army Regulations, 1910, which provides that—

“If articles of public property are embezzled, or lost or damaged through neglect, by a civilian employee, the value or damage as ascertained (and by a survey if necessary) shall be charged to him and set against any pay or money due him”; and as such civilian employee his pay was subject to deduction under the conditions specified in said regulation;

And held further, that as the superintendent of the Antietam battlefield was appointed by the head of an executive department pursuant to statutory authority (act of Aug. 24, 1912, 37 Stat., 440, and act of June 23, 1913, Pub. No. 3, p. 31), and the designation applied to the position in said statutes implied that said superintendent was to be intrusted with the immediate possession and safe-keeping of the public property pertaining to said battlefield, he should be regarded as an officer or agent of the Government within the meaning of the act of March 29, 1894 (28 Stat., 47); and that as such officer or agent his account with the Government might be debited with the amount of any loss sustained by the Government, through his fault, in respect of property intrusted to his care.

(80-121, J. A. G., Aug. 13, 1913.)

TRANSPORTATION: Cost of, of soldier convicted of absence without leave.

A soldier convicted by a court-martial of absence without leave was charged with the expenses incurred in transporting him from the place of apprehension to the place of his trial. The question submitted was whether he could also be charged with the expenses incurred in transporting him from the place of his trial to the station of his company.

Held, that where a soldier had been tried and convicted as in this case, and the cost of his transportation from the place of apprehen-

public quarters at the post or station at which he is serving are fully occupied, it is the duty of this office to admit such voucher regardless of the fact that it is known that the officers occupying such quarters are occupying more than their authorized allowance of rooms."

Held, that with but very few exceptions made by law the certificate of approval of an officer is not intended to be conclusive upon the accounting officers, but that the latter must render a decision on the legality of the claim for payment or for crediting an account upon the facts; that upon them is cast the responsibility for securing the facts and upon other officers the duty of furnishing upon request such evidence in addition to certificates as may be called for by the accounting officers; that this right to call for evidence is inseparable from the duty to audit and to decide questions of law and fact, and that it must be exercised reasonably as must any public duty, but that the accounting officer, and not an administrative officer incurring liabilities or expending public funds, must determine the extent to which it may be necessary to go in any particular case in collecting the evidence to establish what he believes to be the essential fact as a basis for decision; that the certificate that public quarters at a post are fully occupied should be accepted as prima facie evidence of the facts underlying the conclusion certified to but should not be considered as the best evidence in all cases nor as relieving the Auditor of responsibility of determining the facts and securing the evidence necessary to a decision.

Held further, that the fact that an officer's application for assignment of quarters in kind was denied did not entitle him to commutation of quarters, if in fact there were public quarters at the post or station which might have been assigned to him, but that, under existing conditions as to construction of houses, rooms in excess of the authorized allowance in a single house assigned to and occupied by an officer and his family were not rooms that must necessarily have been assigned to another officer, and that while such conditions existed these excess rooms were not quarters and probably ought not to have been provided with furniture or light or separate heating; that commutation of quarters for an officer on duty at a post where there were public quarters could not be granted by an order; that the facts determined the right and that when the only rooms unoccupied were rooms in single houses in excess of the authorized allowance of the occupants of those houses, but not adapted for separate quarters, there were no public quarters within the meaning of the law, but that the contrary was true where there were quarters occupied by persons not entitled to quarters; that the question whether or not there were inhabitable although undesirable public quarters and all other questions involved in the payment of commutation must be decided by the Auditor or Comptroller in each case, and that while they might prefer to accept the decision of other officers they could not shift their duty in this manner, and must accept certificates of facts and conclusions only so far as they believed the situation justified that course.

(Asst. Comp. W. W. Warwick, Aug. 18, 1913.)

officers of the Government were without authority to settle (*Cramp v. United States*, 216 U. S., 494).

(Comp. Geo. E. Downey, Aug. 21, 1913.)

CONTRIBUTED FUNDS: In connection with authorized work of improvement of rivers and harbors.

Section 8 of the river and harbor act, approved March 4, 1913 (37 Stat., 827), provides as follows:

"That the Secretary of War is hereby authorized to receive from private parties such funds as may be contributed by them to be expended in connection with funds appropriated by the United States for any authorized work of public improvement of rivers and harbors, whenever such work and expenditure may be considered by the Chief of Engineers as advantageous to the interests of navigation."

Held, That any funds received by the Secretary of War under the provisions of the above section of said act of March 4, 1913, should be deposited by him in the Treasury of the United States as a special fund, properly designated in each case to distinguish it from other funds where it would be subject to his official direction the same as the funds appropriated by Congress for the particular objects for which such funds are contributed; that the amounts of the disbursements of such special funds should be filed, audited, and accounted for the same as the funds appropriated by Congress, this being the only way of keeping proper track of said funds.

(W. W. Warwick, Asst. Comp., July 17, 1913.)

INSURANCE: Disposition of moneys received from, upon dredges being constructed under contract, which were damaged by fire.

Two dredges being built under contract for the Engineer Department were damaged by fire in the contractor's plant. The specifications to the contract contained the following provision as to insurance:

"The contractor shall keep the dredges or component parts thereof insured against fire and marine risks, at his own cost, for and in behalf of the United States, and in the name of the contracting officer, to at least the full amount of the payments which shall have been made by the United States * * *."

The loss to the dredges by fire was reported to have totaled \$3,411.77, which amount was paid to the contracting officer. Of this amount, \$1,603.27 represented the loss on material for which the Government had already paid, and the balance, \$1,808.50, represented the amount due the boiler works for material which they had furnished but for which they had not been paid by the Government. The question submitted was as to what disposition should be made of the insurance money received.

Held, that the amount which represented the loss on material for which the Government had already paid, i. e., \$1,603.27, should be deposited to the credit of the appropriation under which the dredges were being constructed, in order to restore the proportion that ex-

The export of paper caps for toy cap pistols does not fall within the prohibition of said proclamation.
(29 Opin. 571, Nov. 18, 1912.)

Whether the export of certain air rifles falls within the prohibition of said proclamation is a question of fact dependent upon whether they can be used in the destruction of life.
(30 Opin. 9, Jan. 6, 1913.)

ARMS AND MUNITIONS OF WAR: Provisions and clothing for use of troops.

The Acting Secretary of War, under date of August 5, 1913, requested an opinion upon the following subject, namely:

"Are the items 'provisions' and 'clothing' for the use of troops to be considered as embraced within the term 'munitions of war' in contemplation of the President's proclamation of March 14, 1912, and the joint resolution of Congress of the same date?"

Said joint resolution amended the joint resolution relating to "coal or other material used in war," approved April 22, 1898 (30 Stat., 630). The resolution as amended prohibits the export of arms or munitions of war to any country in which according to the President's proclamation conditions of violence exist which are promoted by the use of such materials.

Held, that neither provisions, nor ordinary, as distinguished from military, clothing fall within the category of "munitions of war."
(Opin. Atty. Gen., Aug. 11, 1913.)

DECISION OF UNITED STATES COURT.

(Digest prepared in the office of the Judge Advocate General.)

COURTS-MARTIAL: United States Navy; jurisdiction and pleadings; habeas corpus.

An enlisted man of the Navy had been tried by a court-martial for making, under oath, false and contradictory statements concerning frauds practiced by him upon the United States in conjunction with representatives of Government contractors from whom supplies for the Navy were purchased. He was found guilty and sentenced to five years' imprisonment at hard labor, deprivation of pay for that period, and dishonorable discharge at the expiration of said period of five years.

1. Article 8 of the articles for the government of the Navy (U. S. Comp. St. 1901, p. 1105), under the head of offenses punishable at the discretion of a court-martial, provides that such punishment as the court-martial may adjudge may be inflicted on any person of the Navy who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, and any other scandalous conduct tending to the destruction of good morals. *Held*, that a charge against a chief commissary steward on board a battleship of scandalous conduct tending to the destruction of good morals, in that on one oc-

Held, that the difficulty due to the entanglement of the lines was plainly of an unusual character, not inherent in the work, and its occurrence could not be foreseen, and that such a state of facts constituted an extraordinary emergency within the meaning of the eight-hour law of March 3, 1913 (37 Stat., 726), and justified working the men more than eight hours in one day.

(32-232, J. A. G., Sept. 3, 1912.)

EIGHT-HOUR LAW: Including provisions of, in a contract for renovating blankets.

A contract was to be entered into in pursuance of an advertisement and award for renovating blankets for the Government and for folding them preparatory to shipment.

Held, that the process of renovation was similar to the process of laundering, and was not to be classed as a process of manufacture; that it could not, therefore, be treated as the manufacture of a supply which could be purchased in the open market without reference to the eight-hour law of June 19, 1912 (37 Stat., 137); and that the provisions of said law relating to the extraction of a penalty for a violation of its requirements should be inserted in the contract.

(76-720, J. A. G., June 25, 1913.)

Held further, that the provision of the law that no laborer or mechanic should be required or permitted to labor more than eight hours in any one day upon work contemplated by the contract, did not prohibit such laborer or mechanic, after working eight hours in one day upon a Government contract, from working additional time upon some other contract. 29 Op. Atty. Gen., 534.

(76-720, J. A. G., Sept. 13, 1913.)

INTERNATIONAL CONGRESSES: Participation therein by the United States Government.

The joint resolution of June 25, 1910 (36 Stat., 886), provides:

“That the President of the United States be, and he is hereby, authorized to invite the International Congress of Refrigeration, now about to assemble in the city of Vienna, to hold its third meeting in the United States of America: *Provided*, That no appropriation shall be asked or granted for any expense connected with the said congress.”

The act of March 4, 1913 (37 Stat., 913), provides:

“Hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so.”

The International Congress of Refrigeration was to be held at Chicago, Ill., September 15 to 24, 1913, and an invitation was extended to the War Department to send delegates thereto.

Held, that, while it might be questionable whether the statute forbidding the Executive from extending or accepting any invitation to participate in any international congress should be so construed

detached for service with the latter. On a petition for writ of habeas corpus—

Held, That the Philippine Scouts were not “other forces” within the meaning of the seventy-seventh article of war. The writ was therefore denied.

(*Atkinson v. Stewart*, Supreme Court, Philippine Islands, Nov. 8, 1912.)

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS: Jurisdiction over; trustee process.

An action of assumpsit on account annexed was brought in a State court in which action the National Home for Disabled Volunteer Soldiers was summoned as trustee. The principal defendant defaulted. The National Home had entered into a written contract with the principal defendant for the construction of certain improvements, and evidence was introduced tending to show a balance due such principal defendant in the hands of the treasurer of the Home at the time of the service of the writ upon the alleged trustee. The court followed the rule that the National Home could not be charged as trustee, for the reason that it was a disbursing agent of the United States Government. On appeal from plaintiff's exceptions to that ruling, *held*, that—

1. The principle that the sovereign can not be sued is predicated upon the condition that it has not consented to be sued, which it may do.

2. The National Home for Disabled Volunteer Soldiers, established under act of Congress March 21, 1866 (14 Stat., 10; U. S. Rev. Stat., sec. 4825 et seq.), is not subject to trustee process in an action brought in a State court; the institution not being properly regarded as having its place of business “within the State” within the trustee process statutes, since the State ceded to the United States jurisdiction over the lands on which the home is situated.

(*Brooks Hardware Co. v. Greer*, Supreme Judicial Court of Maine, 87 Atl. Rep., 889.)

without cost to the Government for a period of one month, and demonstrate its ability to produce the required results," and further that the contractor would "be held responsible for all damages to the buildings whether from fire or other causes during the prosecution of the work and until the same is finally accepted." During the test contemplated by the contract and before acceptance by the Government the crematory was damaged by fire to the extent of \$300.

Held, that as the plant had not been accepted when the damage occurred, the responsibility for the loss should be placed upon the contractors.

(79-600, J. A. G., Oct. 16, 1913.)

COURTS-MARTIAL: Jurisdiction of summary and special courts; reduction in rank.

The act of March 2, 1913, relating to courts-martial, provides that (37 Stat., 722)—

"Summary courts-martial shall have power to adjudge punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto reduction to the ranks in the cases of noncommissioned officers and reduction in classification in the cases of first-class privates," and the same limitation as to reduction in rank applies to special courts-martial.

Held, that a cook, not being a noncommissioned officer nor a first-class private, could not be reduced by sentence of a summary or of a special court-martial.

(30-734, J. A. G., Oct. 1, 1913.)

LINE OF DUTY: Soldier on pass; contributory negligence.

A soldier was absent from his post on pass. Two trains left the railroad station at the same time, one bound for his post and the other for other points. About the time for the trains to leave and before his pass had expired, the soldier was seen running up the street of the town toward the depot. The train going to the place not his station was just pulling out, and in endeavoring to board a freight car on said train he missed his hold, fell under the car, and received injuries from which he died the next day.

Held, that under the circumstances it might be safely assumed that the soldier mistook his train and was trying to board the train going to his station when he fell and was injured. *Held further*, that while an attempt to board a moving train is attended with danger, the amount of danger and consequent negligence in attempting to board it varies directly with the speed of the train; that the soldier in attempting to board the starting train was not necessarily guilty of such negligence as would cause him to be considered outside of a pension status; and that his death might be considered as occurring in line of duty and as not being the result of his own misconduct.

(54-022, J. A. G., Oct. 7, 1913.)

service and owned by an officer or enlisted man in the service, and that such loss is without fault or negligence on the part of the claimant."

The Comptroller further referred with approval to the decision of the Assistant Comptroller of the Treasury in 18 Comp. Dec., 47, holding that the class of private property to which said act of March 3, 1885, relates, does not include horses belonging to officers and enlisted men in the military service, and that the accounting officers of the Treasury were without jurisdiction to receive and audit the claim of an officer or enlisted man for the loss of a horse in said service, thus overruling the decision in 19 Comp. Dec., 532, which had overruled the decision of the Assistant Comptroller.

(Comp. Geo. E. Downey, Oct. 20, 1913.)

TELEPHONE SERVICE: Installation of, in private quarters; common use of trunk line.

Three telephone trunk lines connected between the exchange of a navy yard and the city and service outside, and were used in common by public official telephones and telephones installed in the private quarters of officers at the yard. The telephone company made a separate charge for the use of telephones in the private quarters of officers, and the question was presented as to the manner of adjusting the payment of bills for the use of the trunk line.

Held, that the quarters of an officer at the navy yard must be regarded as a private residence within the meaning of section 7 of the act of August 23, 1912 (37 Stat., 414), prohibiting payment for telephone service installed in any private residence or private apartment; and that the paymaster was not authorized to pay the entire amount of the bill for the use of the trunk lines from Government funds and then to reimburse said funds from money afterwards collected from officers in whose quarters the telephones were installed, but that the charge for the rental of the trunk lines used in common should be apportioned between the officers having telephones in their quarters and the Government according to the number of telephones used by each, respectively.

(Comp. Geo. E. Downey, Oct. 6, 1913.)

TRANSPORTATION: Excess baggage on change of station; mileage status.

A disbursing quartermaster of the Army submitted for advance decision the question of the legality of payment for transportation of 200 pounds of excess baggage belonging to an officer changing station and transported on the same train. The transportation was furnished in July, 1913. It was assumed that the officer was entitled to and had received mileage for his travel. In a decision of the Comptroller's office of September 19, 1913, it was held that there was no authority of law for the transportation at public expense of the personal baggage accompanying an officer on a journey for which he receives mileage, regardless of whether the journey was on temporary duty, temporary change of station, or permanent change of station;

but that as the practice of paying for the transportation of excess baggage had been long continued, payments for such transportation by disbursing officers made not later than the 24th of September, 1913, if otherwise correct, would be passed to their official credit.

Held, that as no payment had been made, the case fell within the decision of September 19, 1913, and there was no authority for making the payment.

(Comp Geo. E. Downey, Oct. 1, 1913; see also decision of Oct. 18, 1913.)

BULLETIN 38.

BULLETIN }
No. 38. }

WAR DEPARTMENT,
WASHINGTON, *December 19, 1913.*

The following digest of opinions of the Judge Advocate General of the Army for the month of November, 1913, including some opinions for the month of October, 1913, not heretofore published; of certain decisions of the Comptroller of the Treasury; and of one decision of a court, is published for the information of the service in general.
(2094269 A—A. G. O.)

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Lump-sum; promotion of employees paid from; mechanics and artisans; change of duties.

It was proposed to increase the compensation of a packer at Omaha, Nebr., paid from a lump-sum appropriation, above the amount which he had been receiving during the preceding fiscal year for the same service, as coming within the exception to section 4 of the act of March 4, 1913 (37 Stat., 790), reading as follows:

“This section shall not apply to mechanics, artisans, their helpers and assistants, laborers, or any other employees whose duties are of similar character and required in carrying on the various manufacturing or constructing operations of the Government.”

Held, that the packer could not be classed as a mechanic or as an artisan, and did not come within the class of employees excepted from the act, and that he was, therefore, subject to the general restrictions of the law.

It was also proposed to promote two clerks who had had additional duties imposed upon them since the beginning of the fiscal year, and who had been paid and were to be paid from lump-sum appropriations.

Held, that in order that the additional compensation might be paid the additional duties should be of a different character from those performed by them during the preceding fiscal year, but that the question of whether these duties were of such different character, or were of sufficient importance in a given case to justify the increase in compensation, was one of administration having in view the importance of the work and its permanency.

(5-075, J. A. G., Nov. 7, 1913; see also decision of Nov. 24, 1913.)

COMMUTATION OF QUARTERS: Officers assigned to station away from a hospital where they were to perform duty; service with troops.

Certain medical officers attached for duty to the Department Hospital were directed to take station at Honolulu, H. T., where they

Held, that there was nothing in the character of the service as described in the law which required that an officer detailed as professor or instructor at an educational institution should be mounted; that the Secretary of War was not authorized to give such service a character different from that implied in the law by declaring the same to require the services of a mounted officer; and that the officer's request should be denied.

(72-140, J. A. G., Nov. 12, 1913.)

RETIREMENT: Of enlisted men; counting time for service in the Philippine Scouts.

An officer of the Philippine Scouts who had had previous service as a commissioned officer but not as an enlisted man, first in the State Volunteers and then in the United States Volunteers in the Spanish War, desired to know whether his service as an officer in the Philippine Scouts could be counted as double time in computing his time for retirement as an enlisted man of the Army, under the act of March 2, 1907 (34 Stat., 417), in connection with the acts of June 30, 1902 (32 Stat., 512), and June 12, 1906 (34 Stat., 248). The act of May 26, 1900 (31 Stat., 209), provides that:

"Hereafter in computing length of service for retirement credit shall be given the soldier for double the time of his actual service in Porto Rico, Cuba, or in the Philippine Islands."

Held, that the acts allowing service with the Philippine Scouts to be counted in computing time necessary to enable an enlisted man of the Regular Army to retire, are applicable only to commissioned officers of the Philippine Scouts who have had previous service as enlisted men in the Regular Army, and who may return to the ranks of the Regular Army; and that should this officer resign his commission in the Philippine Scouts and enlist in the Army, he would not thereafter, upon application for retirement, be entitled to count his commissioned service in the Philippine Scouts.

(88-800, J. A. G., Oct. 25, 1913.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ACCOUNTABILITY: Disbursement of public funds; manner of payment in foreign countries.

A decision was requested as to whether or not a disbursing officer was authorized to pay a creditor of the United States residing in a foreign country by bill of exchange or draft purchased from a bank, in a case where payment was to be made in foreign currency or where the purchase had been made at a given price in the country of purchase.

Held, that the purchase of a bill of exchange or draft to be sent to a public creditor residing in a foreign country was not authorized as a payment of the creditor, and that payment of such creditors should continue to be made as indicated in the decision of December 4, 1907

PAY OF ARMY: Increase for foreign service; physical presence in the United States.

The act of June 30, 1902 (32 Stat., 512), provides:

"That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

The Auditor for the War Department submitted a modification of the existing construction of said law by deciding that no officer or enlisted man of the Army who is physically present in the United States can receive foreign-service pay under said act. The Auditor's decision was approved, thus reversing the decision of the Assistant Comptroller of June 28, 1907 (13 Comp. Dec., 884), but that no injustice might be done, *held*, that where payments had theretofore been made by disbursing officers under the former ruling of the Comptroller such payments would be passed to their credit.

(Comp. Geo. E. Downey, Nov. 20, 1913.)

REPAIR OF BUILDINGS: Of the Engineer Department used as barracks and quarters; appropriation.

Two buildings of the Engineer Department located at Fort Flagler, Wash., not being required for immediate use by that Department, were turned over to the quartermaster of the post and were used as quarters for troops. It was contemplated that the buildings would be again needed for the Engineer Department, which department, for that reason, declined to relinquish control of them, but refused to make interior repairs.

Held, that the payment for the necessary repairs to said buildings while so occupied as quarters was authorized from the appropriation for "Barracks and Quarters" contained in the act of March 2, 1913 (37 Stat., 714).

(Comp. Geo. E. Downey, Nov. 17, 1913.)

TRANSPORTATION: Professional books as household effects on changing station.

A railroad company transported the personal property of an officer of the Army changing station which property consisted, besides various articles of equipment and household furniture, of a quantity of professional books, all apparently loaded into one car. The company contended that the professional books were not properly included in household goods entitled to carload ratings, and that payment should be made therefor in addition to the carload rate allowed for the remainder of the shipment.

Held, that while for administrative purposes professional books were segregated by Department regulations from other household goods of an officer changing station, yet as the term was used in rail-

BULLETIN 1.

[NOTE.—Bulletin No. 38 is the last of the series for 1913.]

BULLETIN }
No. 1. }

WAR DEPARTMENT,
WASHINGTON, *January 20, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of December, 1913, including some previous opinions not heretofore published, of certain decisions of the Comptroller of the Treasury, and of decisions of courts, is published for the information of the service in general.

[2094269, B—A. G. O.]

• BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CLAIMS: For assisting in extinguishing a fire on a Government vessel; salvage.

The captain of a private vessel rendered assistance with his vessel in extinguishing a fire which broke out on a Government boat, and in so doing sustained damages in the loss of personal property, for which he claimed compensation.

Held, that if it be shown that the Government vessel was in real danger of destruction or of serious damage from the fire, and the service was rendered voluntarily in saving the vessel from such danger, the claim might be treated as one in the nature of salvage and paid accordingly, provided the service was not rendered as a part of the claimant's regular duty.

(18-400, J. A. G., Dec. 1, 1913.)

DISCHARGE: By purchase; date when right becomes effective; discharge away from permanent station.

War Department General Order 23 of March 28, 1913, fixed for discharges by purchase after 11 years' service a rate of \$30 for the United States and \$80 for the Philippine Islands. Prior to said order the rate was \$30 for like length of service regardless of place of discharge.

A soldier stationed in the Philippine Islands went on furlough for three months, and while in the United States on said furlough and two days before the date of General Order No. 23, applied for his discharge by purchase. His application having been approved, he

Held, that the law which fixes the pay and allowances of Philippine Scouts the same as those authorized for officers of like grade in the Regular Army, did not include the privilege of retirement, and that the retirement of the officer could only be accomplished through an act of Congress. Dig. Ops. J. A. G., 1912, p. 987, 5a.

(6-250, J. A. G., Dec. 2, 1913.)

RETIREMENT: Promotion for service other than as a cadet; picket duty at West Point, N. Y.

Certain officers of the Army now retired applied for promotion of one grade in rank "for services in the Civil War rendered otherwise than as a cadet" under the provisions of the act of April 23, 1904 (33 Stat. 264), which authorizes the retirement or advancement on the retired list of one grade above the rank held at the time of retirement of officers below the grade of brigadier general who served in the Regular or Volunteer forces during the Civil War prior to April 9, 1865, "otherwise than as a cadet." Said officers were cadets at West Point, N. Y., during the draft riots in New York City in 1863, and while the academic studies were suspended at the academy they were assigned to picket duty with instructions to watch for rioters in boats, who according to rumors, intended to visit and destroy Cold Spring Foundry, then the largest establishment for making guns in the country, and at the same time to visit and destroy West Point.

Held, following a previous opinion of this office (C. 21468, J. A. G., May 1, 1907), that the service rendered was service as a cadet, and that the request must be denied.

(88-410, J. A. G., Dec. 5, 1913.)

TRANSPORTATION: Signing request; delegation of authority.

A request for transportation issued from the office of a quartermaster was countersigned in the name of the quartermaster by the post quartermaster sergeant in charge of the office in his absence, the post quartermaster sergeant adding his own name.

Held, that the regulations contemplate the final issue of transportation requests by commissioned officers of the Quartermaster Corps; that the law authorizing the appointment of post quartermaster sergeants did not authorize such sergeants to perform any duty imposed upon commissioned officers; and that the duty of countersigning transportation requests required the exercise of judgment and discretion which could not be entrusted by the officer to others. *Held further*, that as the officer had ratified the action of the post quartermaster sergeant in signing his name to the transportation request, no question could be raised as to the validity of a claim for transportation furnished thereunder, *but advised* that the practice be discontinued for the future.

(94-201, J. A. G., Dec. 10, 1913.)

Held, that said appropriation was not available for the construction of temporary hospitals in camp.

(Comp. Geo. E. Downey, Dec. 8, 1913.)

COMMUTATION OF QUARTERS: At temporary station while retaining quarters at permanent station.

An officer in occupancy of public quarters at his permanent station was ordered to report to the commandant of the Army Service Schools at Fort Leavenworth, Kans., for a special course in tactics, and on completion of the same to rejoin his proper station. The Secretary of War advised the commandant by telegraph that any available quarters might be used for the accommodation of the officer, and that if none were available commutation was authorized. The commandant reporting that no quarters were available for him, commutation was paid, and the amount having been disallowed by the auditor, was refunded by the officer. The officer claimed commutation by virtue of the provisions of paragraph 1325, Army Regulations, 1910, which provided that:

“An officer does not lose his right to quarters or commutation at his permanent station by a temporary absence on duty. While he continues to claim and exercise that right, he can not legally demand quarters or commutation thereof at any other station.

“The mere fact that an officer’s family or his household goods are permitted by proper authority to remain in quarters at a military station does not prevent the assignment of quarters to him where he is actually serving, or debar him from commutation if he is on duty without troops at a station where there are no public quarters. In these exceptional cases commutation of quarters will be allowed only on the approval of the general commanding the troops in the Philippine Islands in cases arising in his command; in all other cases on the approval of the Secretary of War after recommendation by the department commander * * *.”

Held, that it was doubtful whether the regulation applied to a case of this kind, but that if it did, it transcended the law which did not entitle an officer to commutation of quarters at his temporary station in addition to public quarters at his permanent station (19 Comp. Dec., 73); and that the telegram of the Secretary of War, if it be considered as an attempt to authorize payment of such commutation, was without effect.

(Comp. Geo. E. Downey, Dec. 23, 1913.)

CONTRACTS: Bailee for hire; liability of the Government for damages.

A barge belonging to a private company was in use in connection with repairs being made to a certain lock on the Kanawha River, W. Va. In unloading a derrick boom the Government engineer lost control of his engine and allowed the timber to fall, which broke into two pieces, one piece going to the bottom of the barge breaking some boards and causing it to sink. It was reported that the accident was partly due to a defect in the broken timber, but it was not shown that the engineer was at fault or careless, or that he was incompetent, or that the engine was defective or out of repair.

for good time, commencing from the first day of his arrival at the penitentiary. The act of June 25, 1910 (36 Stat., 819), declares that every prisoner confined for a term of more than one year, whose record shows an observance of the prison rules and who has served one-third of his term, may be released on parole. Section 3 declares that the parole shall be granted on such terms as the board of parole shall prescribe, the prisoner to remain while on parole in the legal custody and under the control of the warden of the prison from which he is paroled and until the expiration of the term or terms specified in his sentence, less such good-time allowance as is provided. The act also provides for the retaking of a paroled prisoner who has violated his parole, at any time within the term or terms of his sentence, and for a hearing before the board, which may revoke the order and terminate the parole, and, if revoked, the prisoner shall serve the remainder of the sentence imposed, the time the prisoner was on parole not being taken into account to diminish the time of his sentence.

A petitioner for a writ of habeas corpus was released on parole August 12, 1911, in accordance with the act of Congress of June 25, 1910, having earned 216 days good-time allowance, as provided by the act of June 21, 1902. He was returned to confinement in the penitentiary May 29, 1912, on account of a violation of his parole and for failure to faithfully observe the rules governing him as a convict on parole. It was claimed that his good-time allowance was forfeited by a violation of his parole.

Held, That "legal custody" and "control" did not contemplate actual custody or confinement of a paroled prisoner, and that such a prisoner was not subject to prison rules providing for a forfeiture of good-time allowance by a breach of such rules, so that on his return for breach of parole he was not subject to a forfeiture of his good-time earned, in determining the date of the expiration of his sentence.

(*Ex parte Marcil*, 207 Fed. Rep., 809.)

the contract providing for a payment of 50 per cent of the contract price of each barge when it should have been provisionally accepted by the United States, at the builders' yard, when, as stated, the barges would be practically completed, and upon such payment would become the property of the United States. Final acceptance and delivery of the barges was to be made to the contracting officer at Louisville, Ky. It was desired to know whether work upon the barges should be regarded as being rendered upon a public work of the United States within the meaning of said act.

Held, that prior to said partial payment and acceptance the barge did not become the property of the United States, and work thereon was not rendered upon a public work of the United States within the meaning of the statute, but that work done after such partial acceptance, in the correction of any defects that might develop between the provisional acceptance and final acceptance, would be rendered upon a public work of the United States.

It was also desired to know whether or not the contract for the construction of the barge or vessel would be a contract for a public work, provided the contract stipulated for payment in a lump sum of the entire contract price after final acceptance of the barge.

Held, that such stipulation would more clearly indicate that the title to the vessel would not pass to the United States and that prior to acceptance and payment it could not be regarded as a public work within the meaning of the statutes.

(32-213, J. A. G., Jan. 9, 1914.)

EMPLOYEES: Compensation for injuries; general prisoners.

A former private in the Army who had been dishonorably discharged therefrom by sentence of general court-martial desired to know whether or not he could get anything on account of his arm having been broken while at work in prison at Alcatraz, Cal.

Held, that it is clear that the injury received by the soldier while serving as a general prisoner did not come within the provisions of the employees' compensation act of May 30, 1908 (35 Stat., 556), as the labor he was performing at the time of his injury was not based upon any contractual relation between himself and the Government, but was rendered as a punishment for military offenses

(18-300, J. A. G., Jan. 21, 1914.)

HEAT AND LIGHT: Sale of fuel allowance to officers' families.

Army Regulations formerly provided for the issue and sale of the fuel allowance of an officer to his family under certain conditions. Following the decision of the Comptroller of the Treasury (W. D. Bul. No. 1, 1913, p. 35) that the authorized fuel allowance to officers could not be issued to their families separate and apart from the officers, the Army Regulations upon the subject were amended so as to omit provision for such sale and issue.

Held, that under the authority of the appropriation for regular supplies contained in the various Army appropriation acts, sales of fuel might still be made to officers for use of their families during

public park under the name of Potomac Park "to be forever held and used for a park for the recreation and pleasure of the people." The act of August 30, 1890 (26 Stat., 396), and of August 24, 1912 (37 Stat., 444), prohibits the erection of any building or structure upon the public parks of the District of Columbia without express authority of Congress.

Held, that there was no legal authority by which a revocable license for the purposes intended could be granted.

(80-800, J. A. G., Jan. 3, 1914.)

RED CROSS SOCIETY: Mileage to officer assigned to take charge of first-aid department.

The question arose as to whether the officer detailed to take charge of the first-aid department of the American Red Cross Society, pursuant to the act of March 3, 1911 (36 Stat., 1041), was entitled to mileage for travel performed in connection with his duties.

Held, that notwithstanding the close relations which the society sustains to the United States under existing law, it is not made a part of the Army, so that travel performed by the officer detailed to take charge of the first-aid department in connection with his duties becomes travel for the Army; and that it could not be certified that such travel was necessary in the military service as required by the act of March 3, 1883 (22 Stat., 456), in order to entitle an officer to mileage. The question was, therefore, answered in the negative.

(84-000, J. A. G., Jan. 13, 1914.)

TELEPHONE SERVICE: Telephones in private residences; room used for office.

The question arose as to whether a telephone might be installed in the private quarters of the attending surgeon at Philadelphia, Pa., in view of the provisions of section 7 of the act of August 23, 1912 (37 Stat., 414), which prohibits the expenditure of any money appropriated by Congress "for telephone service installed in any private residences or apartments or for toll or other charges for telephone service from private residences or apartments, except for long-distance tolls required strictly for the public business."

Held, that if the telephone in question is deemed necessary for the public business of the attending surgeon at Philadelphia, and if no other provision is made for such service, the law would not prohibit the payment for this service installed in a room of the officer's private quarters set apart for the transaction of his necessary public business as attending surgeon.

(72-335, J. A. G., Jan. 12, 1914.)

TRANSPORTATION: Travel allowance on discharge; transportation over different lines.

The depot quartermaster at San Francisco, Cal., desired instruction as to the manner of issuing transportation requests covering transportation of soldiers on discharge where they wished to travel

Held, that while it appeared that the contractor was in default under his contract it was incumbent upon the Government to show the damages which it sustained, which damages were limited to the difference in cost between the article called for in the contract and the cost of the same or practically the same article on the market, and could not be measured by the difference between the contract price and the cost of another article materially different selling in the market for a much higher price than the contract article. *Held further*, that the Government could not recover the difference of the cost from the contractor.

(Comp. Geo. E. Downey, Jan. 19, 1914.)

DAMAGES: Repairs of barge under verbal agreement; owner making repairs; appropriation.

The Government engaged a barge from a private company to supply it with coal at a certain lock on the Ohio River upon the express agreement that it was to be returned in as good condition as when received, but no written agreement was entered into. The barge was badly damaged in the course of bringing it through shallow water.

Held, that it was the right of the Government to have made the necessary repairs, but that as it waived this right and permitted the owner to do so, the latter should be regarded as the agent of the Government for the purpose of making such repairs and that the Government was liable for the reasonable cost of such repairs as were made necessary by any damage done to the barge while in said service. *Held further*, that the appropriation for the work in hand was available for the payment of said claim if otherwise correct.

(Comp. Geo. E. Downey, Dec. 15, 1913.)

EMPLOYEE: Paid from lump-sum appropriation; increase of efficiency.

Upon submission of certain questions by the Attorney General—

Held, that an increase in an employee's efficiency is not sufficient to warrant an increase in his salary payable from a lump-sum appropriation unless accompanied with a substantial change in the character of the service to be rendered.

Held further, that where the compensation paid from a lump-sum appropriation to the incumbent of a given position during a preceding fiscal year was less, because of inexperience or incapacity, than that paid in other like positions for the efficient performance of the same or similar services, a new employee appointed to the position who discharges its duties efficiently may be paid a rate of compensation which does not exceed the rate paid in other like positions for the same or similar services during the preceding fiscal year.

(Comp. Geo. E. Downey, Aug. 21, 1913, 20 Comp. Dec., 131.)

FORAGE: Mount not complying with regulations.

A major of Infantry claimed reimbursement for amounts expended by him for forage and straw and for shoeing his privately

Held, that where an officer occupies quarters other than public the fuel or illuminating supplies for which can not be measured, he is entitled to not more than the allowances prescribed in the regulations for the number of rooms actually occupied; that the officer's certificate as to the number of rooms actually occupied by him, if sufficiently specific, will ordinarily be accepted by the accounting officers as sufficient evidence of that fact, but it is not conclusive, and in any case the accounting officers may require other evidence; that such certificate should show the number of rooms actually and exclusively occupied as his quarters and that the number does not include bath rooms, store rooms, or rooms used in common with other guests or tenants, such as public dining rooms, parlors, kitchens, halls, etc. *Held further*, that if the officer's quarters are actually occupied by his family or by persons dependent upon him for support during his absence with leave, payment for the heat and light allowance for such period was authorized; otherwise the officer was entitled to no heat and light allowance for such period.

(Asst. Comp. W. W. Warwick, Aug. 15, 1913, 20 Comp. Dec., 83.)

LIVING EXPENSES: Travel day; nights lodging.

In measuring a travel day for the purpose of computing daily expenses after review of certain decisions,

Held, that the daily charge for living expenses should commence with the charge for breakfast and end with the charge for lodging for the whole of the following night. The decision 19 Comp. Dec., 672, is modified accordingly.

(Comp. Geo. E. Downey, Jan. 7, 1914.)

MILEAGE: Cost of transportation under orders; hire of automobile.

An officer of the Army was ordered to travel on public business to a certain point and return. For a portion of the distance no railroad facilities were available and he was compelled to hire an automobile for this part of the journey. The mileage law of June 12, 1906 (34 Stat., 246), provides that officers of the Army traveling under competent orders without troops shall be paid 7 cents per mile and no more; that he may apply to the Quartermaster's Department of the Government for a transportation request for the journey, and if the same is furnished him it shall be charged against his mileage account at the rate of 3 cents per mile for whatever distance transportation is furnished.

Held, that said provisions were not repealed by the appropriation for transportation of the Army and its supplies (act of Mar. 2, 1913, 37 Stat., 716); "For the purchase, hire, operation, maintenance, and repair of such harness, wagons, carts, drays, and other vehicles as are required for the transportation of troops and supplies, and for official, military, and garrison purposes," and that the officer could not be reimbursed for the hire of the automobile.

(Comp. Geo. E. Downey, Dec. 16, 1913.)

so furnished shall, if travel was performed under a mileage status, be a charge against the officer's mileage account to be deducted at the rate of 3 cents per mile by the paymaster paying the account."

Provision is also made in the Army appropriation act of March 2, 1913 (37 Stat., 716), for the purchase, hire, operation, maintenance, and repair among other things of wagons, harness, carts, and other vehicles as required for the transportation of troops and supplies and for official and military and garrison purposes.

Held, That the Army appropriation act had no reference to the mileage law and did not repeal or enlarge any of its provisions; that the mileage law goes no further than to authorize the issue of transportation requests over established lines of common carriers by land and water and that it does not authorize the hiring of an automobile for travel of an officer to a point inaccessible by common carriers.

(Comp. Geo. E. Downey, Jan. 12, 1914.)

TRAVEL ALLOWANCES: On discharge; soldier not furnished sleeping-car accommodations.

A soldier honorably discharged and entitled to travel allowances under the act of August 24, 1912 (37 Stat., 576), was furnished by the quartermaster with proper transportation from St. Paul, Minn., to Houston, Tex.; but although sleeping-car accommodations were demanded by the soldier, the same were not furnished by the quartermaster, and the soldier paid for them himself, to the amount of \$8.50, being the charge for a lower berth of a standard sleeper for said travel.

General Order No. 54, of December 18, 1912, War Department, provides that:

"When discharged soldiers elect to take transportation in kind and subsistence to place of enlistment, they will be entitled to the following:

* * * * *

"(b) * * * If tourist car not available, an upper berth in a standard sleeper may be furnished if practicable; if not, a lower berth. No sleeping-car accommodations will be furnished in any instance when a night's journey is not involved and the distance does not exceed eight hours' travel."

In this case it is certified that tourist-car accommodations were not available.

Held, that under present conditions of travel, when the journey involves night travel, it is recognized as a necessity by the Government to furnish to its employees sleeping-car accommodations in connection with transportation; that the soldier did not lose this right by accepting the transportation under protest and paying for the sleeping-car accommodations himself; and that he should be reimbursed in the amount which it would have cost to have provided an upper berth in a standard sleeper in accordance with said General Order No. 54.

(Comp. Geo. E. Downey, Oct. 7, 1913.)

BULLETIN 8.

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No. 8. }

WAR DEPARTMENT,
WASHINGTON, *March 14, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of February, 1914, of a decision of the Comptroller of the Treasury, and of certain decisions of the Court of Claims, together with certain notes on the administration of military justice, is published for the information of the service in general.

[2094269 D—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: From duty, due to misconduct; stoppage of pay.

The Army appropriation act of August 24, 1912 (37 Stat., 572), provides that a soldier shall not receive pay from the appropriation contained in the act while he may be absent from duty on account of disease "resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct." A soldier attempted suicide by cutting his throat with a razor. Careful investigation showed that the act was committed because of acute melancholia, recurrent, existing prior to enlistment, the result of lack of success in civil life, and that there was no family, love, criminal, or vice troubles, and that the recruit was incapable of an appreciation of his act.

Held, that the case falls under the opinion of this office of February 14, 1913 (Bul. No. 8, W. D., Mar. 18, 1913, p. 3), "that the words 'other misconduct' in the statute are limited by the rule of *ejusdem generis* to conduct of the same general character as that indicated by the words preceding them, to wit, 'intemperate use of drugs or alcoholic liquors,' or misconduct consisting in the intemperate or improper indulgence of natural or acquired appetites;" and that the pay of the soldier during his temporary disability should not be withheld.

(72-210, J. A. G., Feb. 18, 1914.)

APPROPRIATIONS—LUMP-SUM: Promotion of employees paid from; change of duties.

A chief clerk whose salary was paid from a lump-sum appropriation had been given, during the current fiscal year, increased re-

CHAPLAINS: Does service on the retired list constitute service for promotion?

The question submitted was whether service on the retired list constitutes service within the meaning of the act of Congress concerning the rank of chaplains approved April 21, 1904 (33 Stat., 226), which act provides under certain conditions for the promotion of chaplains to the "grade, pay, and allowances of major."

Held, that service on the retired list did not constitute "service" within the meaning of that term as used in said act.

(6-229.3, J. A. G., Feb. 3, 1914.)

COMPTROLLER OF THE TREASURY: Submission to, by the department, of voucher of disbursing officer for advance decision.

A district engineer officer suspended, on June 30, 1913, an assistant engineer, pending the outcome of charges which he preferred against him for inefficiency. Upon investigation, the Secretary of War failed to sustain the charges, and the officer was so advised by the Chief of Engineers, and also that the assistant engineer should be restored to duty and paid his authorized salary from the date of his suspension until his restoration to duty. The officer, before making payment, forwarded through the Chief of Engineers a voucher for the amount of salary due said assistant engineer for the period named, with the request that it be submitted to the comptroller for an advance decision. The Chief of Engineers forwarded the same with favorable recommendation.

The question was raised as to "whether there was occasion for the department to submit this case to the Comptroller of the Treasury."

Held, that the circumstances of the case clearly brought it within the decision of the Comptroller of May 7, 1906 (12 Comp., Dec., 653), wherein it was held that where a subordinate "suspends a civilian employee from duty without pay *when he is able and willing to perform his duties*, and prefers charges against him, and the Secretary of War subsequently declines to sustain the charges and decides that his suspension was not justified, said employee is entitled to pay during the period of his suspension," and also within the decisions of the Court of Claims in the case of *Stilling v. United States* (41 C. Cls., 61), and the Supreme Court of the United States in the case of *United States v. Wickersham* (201 U. S., 390), both of which were to the same effect as the above decision of the Comptroller; that, therefore, there would appear to be no good reason why the department should submit the question of the payment of this voucher to the Comptroller, but that the disbursing officer had the right under the law to submit the voucher to the Comptroller before paying the same, if he was doubtful as to the legality of the proposed payment.

(16-211, J. A. G., Feb. 27, 1914.)

CONTRACTS: Agency; final payment on a contract to person holding power of attorney.

The contractor for the extension of the water distributing system at West Point, N. Y., being without funds, in consideration of an

BULLETIN 14.

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No. 14. }

WAR DEPARTMENT,
WASHINGTON, *April 14, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of March, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2094269 E—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

LEONARD WOOD,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CIVILIAN EMPLOYEES: Medical treatment in hospital after discharge from service; reimbursement for subsistence.

A former civilian teamster, while in the service of the Quartermaster Department at Fort St. Michael, Alaska, was severely injured and taken to the post hospital for treatment. Before he left the hospital he had been discharged from the service, and was destitute and unable to pay his hospital expenses when he left the hospital.

Held, that from the regulations and the conditions affecting the man's service as appeared from the papers in the case, he was entitled to medical treatment at Government expense for his injury, and that this right continued for a reasonable time for such treatment, notwithstanding his relations with the Government as an employee had ceased, but that this right did not include treatment for chronic ailments or for an injury after it had become evident that the same was incurable or that the patient's condition could not be improved by further treatment. *Held further*, that it was proper to issue rations at the expense of the appropriation for the subsistence of the Army to reimburse the hospital fund for the subsistence of the patient.

(16-414, J. A. G., Mar. 28, 1914.)

CONTRACTS: For supplies; receiving bid after time for opening; excuses for delay.

Bids were received for 6,000 trunk lockers at the Philadelphia, Pa., depot February 25, 1914. The circulars to bidders specified that the bids would be opened at 11 a. m. on that day, and that proposals re-

TAXATION: Of Government agencies; fee for inspecting mount of an officer transported by the Government.

A horse belonging to a retired Army officer was in transit at Government expense from Fort Laredo, Tex., to Mobile, Ala., the officer's home. At New Orleans, La., the horse was inspected by a State official and a fee of \$5 charged therefor, which the railroad company furnishing the transportation paid. The inspection was considered necessary under State laws, because the animal was not accompanied by a proper health certificate. The horse was the private mount of the officer, who was proceeding home under orders after his retirement. On claim for reimbursement of the amount paid as inspection fee—

Held, that the horse was to all intents and purposes Government property for transportation; that it would not be reasonable or proper that any State official should interfere with the movements of the Army by requiring an inspection of animals shipped by the Government through its territory; that the inspection fee, if a proper charge at all, was a charge against the United States; and that the right of the State to levy such a charge could not be recognized. 2 Comp. Dec., 375.

(Comp. Geo. E. Downey, May 8, 1914.)

TELEGRAPH SERVICE: Charges for; night and lettergram rates.

The Postal Telegraph-Cable Co. presented a voucher representing the difference between the night lettergram rate and the rate for night messages on two telegrams sent from points in the United States to the United States Immigration Service at Vancouver, British Columbia, and Montreal, Canada, respectively. These telegrams were marked by the sending officers as "night lettergrams," for which form of message the charge was cheaper when the messages approached 50 words or more than the ordinary night-message rate, but owing to the small number of words in these messages the night rate would have been less than the lettergram rate.

Held, that the mistake of the sending officers in wrongly designating the type of message did not change the character of the service actually rendered and did not entitle the sending company to charge an excessive rate for the messages as sent nor to charge an amount in excess of the rate for night messages; that the mistake in designation did not affect the charges of the connecting carrier, the Canadian Telegraph Co., as the rates of that company were alike for night messages and lettergrams; and that the sole result of the mistake was to cause charges to be erroneously entered on the books, for which mistake the transmitting company was as much responsible as the sending officers.

(Comp. Geo. E. Downey, Apr. 22, 1914.)

TRANSPORTATION: Hire of automobile for officer traveling on a mileage status.

A recruiting officer of the Army was directed to travel under orders entitling him to mileage from Memphis, Tenn., to Pittsburg Landing, Tenn. A portion of the journey was made by rail, but no such

“For additional ten per centum increase on pay of officers on foreign service.”

An officer of the Marine Corps sailed from New York June 27, 1908, under orders, for duty in Porto Rico with station at San Juan, and served there until November 3, 1909, when he was detached and ordered back to the United States, arriving there four days later. The pay of the officers of the Marine Corps is fixed by section 1612, Revised Statutes, at the same as officers of like grade in the Infantry of the Army. This officer sued in the Court of Claims for \$209.78, being 10 per cent of his regular pay, for service in Porto Rico during the period in question.

Held, that the provision in the act of June 12, 1906, appropriating for the Army for the fiscal year 1907, and in the act making similar appropriations for the fiscal year following, excepting Porto Rico and Hawaii from the appropriation for 10 per cent increase of pay for officers serving therein, was temporary legislation, was not intended to affect permanently the act of June 30, 1902, and did nothing more than to suspend temporarily said act as to Porto Rico and Hawaii; and that the plaintiff was entitled to recover the increase claimed.

(*U. S. v. Vulte*, U. S. Supt. Ct., May 4, 1914, 233 U. S., 509.)

command by reason of such absence. *Held further*, that the company which might leave for duty in another department for an indefinite period could not be regarded as still constituting a part of the command of the officer, and when the detached-service legislation was applicable the period when this officer commanded only one company would have to be regarded as duty other than duty with "a command composed of not less than two companies."

(6-124, J. A. G., June 18, 1914.)

EIGHT-HOUR LAWS: Contract for dredging; work on retaining bulkheads.

A contract provided for excavating in Flushing Bay, N. Y., and for depositing the material excavated behind bulkheads constructed in shallow water or at the water's edge, all embankments or bulkheads needed for confining or grading the material with necessary waste weirs to be provided by the contractor without assistance by the United States. The men employed in constructing the sod retaining walls of the bulkheads were not directly operating the dredge or regular excavating machinery or tools. The work was done prior to the commencement of dredging operations, no supervision was exercised over said work, and no inspector was deemed necessary until the dredge was ready to begin excavation.

Held, that such labor was not performed upon a public work of the United States and was not therefore covered by the act of August 1, 1892 (27 Stat., 340); but that, as the contractor was required to furnish his own disposal area, the work of constructing the bulkheads to retain the dredged material as required by the contract was, under the stipulations of the contract, work involved in the contract, and whether the same was done by the contractor or by a subcontractor, it fell within the provisions of the act of June 19, 1912 (37 Stat., 137), regarding the execution of public contracts involving the employment of laborers and mechanics.

(76-720, J. A. G., June 8, 1914.)

ENLISTED MEN: Of the Army Reserve; employment of, in the civil service.

The act of August 24, 1912 (37 Stat., 590), authorized the establishment of an Army Reserve consisting of enlisted men with a military status closely assimilated, in respect to nonliability for active service in time of peace, to that of retired noncommissioned officers and enlisted men created by the act of February 14, 1885 (23 Stat., 305).

Held, that the status of the Army Reserve, being analogous to that of retired noncommissioned officers and enlisted men, which latter might be employed in the civil service of the Government, enlisted men of the Army Reserve could likewise be so employed, both in the classified and unclassified civil service, under such regulations, examinations, and tests as might be prescribed by the Civil-Service Commission.

(16-110, J. A. G., June 20, 1914.)

statute, which obstruction might be removed or abated; and that under the clauses of said section 10 succeeding the general prohibition therein, the Chief of Engineers and the Secretary of War might authorize the operation of seines which constitute obstructions to the navigable capacity of said river, but which, if not authorized, would be prohibited by the opening declaration of said section, said character of obstruction coming within the concluding language of said section.

(62-100, J. A. G., June 11, 1914.)

PURCHASES: Of supplies; advertising for purchase of an aeroplane; lack of competition.

The Chief Signal Officer of the Army desired authority "to hold a competition for the development of a suitable military aeroplane for service use, purchasing the machine making the highest points in the competition" for a certain price, the machine making the next highest number of points for a less price, and the machine making the next highest number of points for still less price. The appropriation for the Signal Service for the fiscal year 1915 authorized the expenditure of not more than \$250,000 for the purchase, maintenance, operation, and repair of air ships and other aerial machines, and placed no restriction upon the Secretary of War as to the method of procuring the same.

Held, that the object not being to procure aeroplanes of standard type, but to develop a suitable one for the military service, the case was one where it was impracticable to secure competition, and where the object could not be attained by advertising; that the statutes regarding advertising were inapplicable; and that no legal objection existed to the course proposed.

(5-231, J. A. G., June 11, 1914.)

QUARTERMASTER CORPS: Recommissioning officers of the constituent departments therein.

Section 3 of the act of August 24, 1912 (37 Stat., 591), provided as follows:

"The Quartermaster's, Subsistence, and Pay Departments of the Army are hereby consolidated into and shall hereafter be known as the Quartermaster Corps of the Army. The officers of said departments shall hereafter be known as officers of said corps and by the titles of the rank held by them therein * * *. The officers now holding commissions as officers of the said departments shall hereafter have the same tenure of commission in the Quartermaster Corps, and as officers of said corps shall have rank of the same grades and dates as that now held by them, and, for the purpose of filling vacancies among them, shall constitute one list. on which they shall be arranged according to rank."

An officer of the consolidated corps held a commission as assistant commissary general with rank of colonel.

Held, that Congress might change the rank and pay of an officer without making a new appointment necessary (*Wood v. United States*, 107 U. S., 414); that the statute effected the consolidation

service, and that the claim of persons who voluntarily pay the Government's obligations can not be recognized, yet as these supplies and services were furnished by Frenchmen unfamiliar with our language, who did not understand our system of vouchers, and who held the officers themselves personally responsible for the service, officers incurring necessary and proper expenses for the purposes stated might be reimbursed upon vouchers properly executed, accompanied by subvouchers showing that the bills were actually paid by them, together with satisfactory certificates as to the necessity therefor.

(Comp. Geo. E. Downey, June 19, 1914.)

PURCHASES: Of envelopes for sale to officers and enlisted men of the Army.

The Auditor for the War Department disallowed items aggregating \$3.64, in the accounts of a quartermaster (the same being payments for envelopes purchased for military posts for sale to officers and enlisted men), on the ground that the purchases were not in accordance with the provisions of the act of June 26, 1906 (34 Stat., 476), which provided that after December 31, 1906:

"* * * the Postmaster General shall contract, for a period not exceeding four years, for all envelopes, stamped or otherwise, designed for sale to the public, or for use by the Post Office Department, the Postal Service, and other executive departments, and all Government bureaus and establishments, and the branches of the service coming under their jurisdiction, and may contract for them to be plain or with such printed matter as may be prescribed by the department making requisition therefor; * * *."

On appeal, the Comptroller of the Treasury affirmed the action of the auditor, and

Held, that the above quoted provision prohibited the purchase of envelopes by or for any Government department, bureau, or establishment, or any branch of the service coming under their jurisdiction, in any other manner than under contract made by the Postmaster General, except in case of exigency where the need for the envelopes was so urgent as not to permit of the delay necessarily incident to obtaining them through the Postmaster General. See 20 Comp. Dec., 34, and decisions therein cited.

(Comp. Geo. E. Downey, June 4, 1914.)

TRAVELING EXPENSES: Actual cost of subsistence.

The urgent deficiency act of April 6, 1914 (Pub. No. 82, 63d Cong., p. 7), provided that—

"On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of \$5 per day; nor shall any allowance or reimbursement for subsistence

be paid to any officer or employee in any branch of the public service of the United States in the District of Columbia unless absent from his designated post of duty outside of the District of Columbia, and then only for the period of time actually engaged in the discharge of official duties."

Held, that said legislation affected only expenses for subsistence; that railroad fare, Pullman charges, street care fare and cab hire, as well as tips to Pullman porters and cabin and deck stewards, were items of transportation, were not chargeable as a part of the cost of subsistence, and were not included in the maximum of \$5 per day allowed for expenses actually incurred for subsistence; and that the latter term included expenses of board and lodging and tips at hotels.

(Comp. Geo. E. Downey, Apr. 22 and 24, 1914.)

BULLETIN 39.

BULLETIN }
No. 39. }

WAR DEPARTMENT,
WASHINGTON, *August 18, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of July, 1914, and of certain decisions of the courts, is published for the information of the service in general.

[2194536, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

GEO. ANDREWS,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ABSENCE: On account of disease resulting from misconduct, or while in confinement; making good time lost.

The act of April 27, 1914 (Pub. No. 21, p. 3), provided:

"That an enlistment shall not be regarded as complete until the soldier shall have made good any time in excess of one day lost by unauthorized absences, or on account of disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct, or while in confinement awaiting trial or disposition of his case if the trial results in conviction, or while in confinement under sentence."

A private soldier of the Quartermaster Corps who had enlisted before the passage of said act was absent from active duty on account of sickness resulting from his own misconduct from March 9 to 25 and from April 17 to May 1, 1914, all dates inclusive. He was being held beyond his period of enlistment to make good the time so lost.

Held, that said act had application only to enlistments entered into on or subsequent to its date and did not affect prior enlistments, except as to unauthorized absences in excess of one day, as to which the law only repeated existing legislation (Dig. Op. J. A. G., 1912, p. 16, B 9); and that the soldier should not be held to service to make up time lost through absences due to the causes mentioned occurring either before or after the passage of the act. *Held further*, that the law being permanent legislation took effect from its date and not from the beginning of the fiscal year for which appropriations were made therein.

(2-234, J. A. G., July 15, 1914.)

* * * by any officer who, before assignment to such duty, shall have been regularly assigned to, and shall have entered upon duty with, an organization or a command the detachment of certain officers from which is prohibited by the act of Congress approved August 24, 1912, or by this act shall, for the purposes of said acts, hereafter be counted as actually present for duty with such organization or command."

Held, that a contingent of the Regular Army employed in the usual joint camps composed of regular troops and organized militia should be regarded as "troops in the field" within the meaning of the above provision; that officers performing duty with troops were not limited to the performance of any particular kind of duty in order to be brought within the special rule; and that officers detailed as instructors at such camp were serving with troops within the meaning of said provision, if they had been assigned to and entered upon duty with commands with which the general law required them to serve for a particular period and such assignment of duty status continued concurrently with such duty.

(6-124, J. A. G., July 6, 1914.)

DETACHED SERVICE: Service with troops; field officer performing duty as commanding officer and in other capacities, in connection with a Coast Artillery district; umpire at target practice.

The detached-service legislation established the general rule that a field officer of the line must have been actually present for duty for at least two of the last preceding six years with a command composed of not less than two troops, batteries, or companies of his branch of the service before he could be detached from such command for duty of any kind.

Held, that a Coast Artillery district was a command composed of not less than two companies of Coast Artillery in the sense of said legislation, and that a field officer of that branch of the service performing duty as commanding officer of a Coast Artillery district, or as adjutant or as matériel officer of such a district, should be considered as actually present for duty with such a command. *Held further*, that the duties of an umpire, as laid down in the regulations for target practice of the Coast Artillery Corps, were not organizational or functional duties pertaining to the district, were not inherent in the organization, and were not regular staff duties at all, and that the duties of such an umpire could not be held to be duty performed with troops in the field within the meaning of the provision in the act of April 27, 1914 (Pub. No. 91, p. 7), which allows temporary duty of any kind performed with United States troops in the field for periods not exceeding 60 days in any one calendar year to be counted as presence for duty with organizations or commands.

(6-124, J. A. G., July 10, 1914.)

EMPLOYEES: Of the United States; employment of foreigners in constructing improvements.

The question was raised as to whether the War Department could give a preference to Americans in the employment of skilled and unskilled laborers in making improvements at the Presidio, San Fran-

pay earned by him before the acceptance of his commission, provided he reenlisted in the Regular Army within three months after his last discharge therefrom, exclusive of the time spent by him as such volunteer or militia officer.

3. That he would not be entitled to credit for his volunteer or militia commissioned service either for continuous-service pay purposes or for retirement.

(72-220. J. A. G., July 21, 1914—two cases.)

HEAT AND LIGHT: Heating of quarters, not public, occupied by officers and enlisted men on temporary duty.

Certain officers and enlisted men on temporary duty at Galveston, Tex., occupied quarters, not public, heated by separate heating and gas plants. It was assumed that they were not drawing any fuel allowance elsewhere, and that they were occupying said quarters by proper authority. Paragraph 1026, Army Regulations, 1913, as amended, so far as applicable, provided:

"Where an officer or enlisted man is occupying quarters other than public heated by a separate plant, the quartermaster will reimburse such officer or enlisted man for the fuel actually necessary for the rooms actually occupied, and not exceeding the number to which the rank of the officer or enlisted man entitles him, as specified in paragraph 1044, and in no case exceeding the maximum allowance set forth in the following table for the zones of equal temperature in which serving."

Held, that the officers and enlisted men could not be furnished with fuel in kind under the above regulation, but that they were entitled to be reimbursed for the fuel purchased by them actually necessary to heat the rooms actually occupied, not exceeding the number to which their rank entitled them, and not exceeding in cost the maximum allowance for the zone of temperature in which they were serving.

(72-313. J. A. G., July 28, 1914.)

MILITIA: Organized, engaging in joint encampments and maneuvers; cost of transportation of subsistence purchased for.

The organized militia of the State of Iowa was about to engage in a joint encampment and maneuver with a portion of the Regular Army, and application was made by the state authorities to purchase from the United States quartermaster at the camp subsistence stores of the Army for use of the state militia at said encampment.

Held, that subsistence stores might be supplied by the officers of the Army for the use of the organized militia at said joint encampment at cost price, with cost of transportation to the point of consumption added, and that such cost should be charged against the militia appropriations available for joint encampments.

(94-500, J. A. G., July 21, 1914.)

NOTE.—In an indorsement of August 4, 1914, in this case, it was held that the same rule applied to all subsistence stores furnished to organized militia at joint encampments.

RANK: Commissioned officers of same date of appointment; commissioned service in the Navy.

Four officers, graduates of the United States Naval Academy, were appointed second lieutenants in the Army and given rank according to the dates of their graduation and according to class standing as between two of them who had graduated on the same day.

Section 1219, Revised Statutes, provided:

"In fixing relative rank of officers of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, should be taken into account. * * *"

Two of the officers had had previous commissioned service in the Navy which, if counted, would have changed the order of relative rank among them.

Held, that the statute did not include commissioned service in the Navy to be counted in determining the relative rank of officers of the same grade and date of appointment, and that the officers were not entitled to have the same counted in determining their relative rank. Dig. Opin., J. A. G., 1912, p. 966, A 2.

(82-211, J. A. G., July 23, 1914.)

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SOLDIERS: Disposition of remains of deceased; reward for recovery of bodies.

Two enlisted men of the Army had been drowned and rewards were offered for the recovery of their bodies. The bodies were recovered in pursuance of the offer and application made for the rewards. The sundry civil act of June 23, 1914 (38 Stat., 31), appropriated for the disposition of remains of officers and soldiers on the active list of the Army, including expense of interment of such remains and of their preparation and transportation to their homes or to national cemeteries.

Held, that the work of recovering the bodies was an incident to their proper interment and preparation and transportation, for which a reward might properly be offered, and that the rewards should be paid from the appropriation for the disposition of the remains of officers and soldiers.

(80-015, J. A. G., July 17, 1914.)

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SOLDIERS' HOME: Admissions to; ability of applicant to earn a living outside.

Two discharged soldiers of the United States Army were admitted into the Soldiers' Home, Washington, D. C., for temporary treatment for disabilities which had occasioned their discharge from the Army. They were relieved sufficiently to permit of their earning their living outside the Home, but their disabilities were such that they could not again be fitted for military service. Neither had served as much as 20 years in the Army when discharged.

a view to her discharge. She traveled only as far as Ogden, Utah., having elected to remain at that place for purposes of her own.

Held, that there being no statute giving to an Army nurse the right of transportation in kind to her home on discharge, or mileage in lieu thereof, the travel performed in going to her home for discharge was travel as an employee of the United States, and that she had no right to any portion of the ticket which had not been used, but whatever rebate there was belonged to the Government.

(94-430, J. A. G., July 20, 1914.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Annulling for default of contractor and reletting; damages against the contractor.

A contract was entered into for dredging in San Pablo Bay, California, in which it was specifically provided that the spoil or waste from the dredging should be dumped behind bulkheads. On the ground that the contractor had failed to comply with the requirements of his contract, the Government proceeded under a paragraph in the contract to annul the same and to complete the work by means of another contract. In the advertisement for reletting the work the option was given to dump the spoil behind bulkheads as required in the original contract or to dump the same in deep water, and the contract was entered into on the basis of the latter alternative. Suit was brought by the United States to recover damages from the contractor and his sureties for failure to complete the work as contracted for.

Held, that the change in the location for dumping the material dredged was a material one and amounted to an important variation from the original contract so as to make it a different work from that which the original contractor was to perform, and that such contractor was not bound for the difference between the cost of the completed work under the original contract and the cost under the new contract.

(*United States v. Axman*, 234 U. S., 36, Mar. 9, 1914.)

PAY OF OFFICERS: During absence with leave; leave without pay.

An officer of the Army, having accepted employment with a commercial company, was granted six months' leave of absence which was afterwards extended four months. After the expiration of six months and during the extension of the leave he was notified that, by direction of the President, although his leave was not revoked, his absence would be without pay. The officer did not request leave without pay nor did he protest against the action of the President or relinquish his leave and return to duty.

Held, that the officer was entitled to pay during the period for which it was directed that his leave should be without pay, and judgment was rendered accordingly, reversing a prior decision of the court in the same case (47 Ct. Cls., 51).

(*Andrews v. United States*, Court of Claims No. 30785, Mar. 16, 1914.)

of War for aviation duty, provided that such increase should be given only to such officers as were fliers of heavier-than-air craft and while so detailed. The act of July 18, 1914 (Pub. No. 143), provided for the organization within the Signal Corps of a section not to exceed 60 officers and 260 enlisted men, the officers to be detailed from the line of the Army below the grade of captain, for limited periods, the extra compensation provided for them being much greater than that provided in the act of March 2, 1913. This organization was charged with the duty of operating or supervising the operation of all military air craft, appliances and signaling apparatus appertaining thereto, and also with the duty of training officers and enlisted men in matters pertaining to military aviation. There was no provision in the later act specifically repealing the former.

Held, that the new law was not repugnant to the old, and there being no specific provision in the new act repealing the old, the act of March 2, 1913, remained in force and was in no way destroyed or diminished by the new legislation.

(6-228.1, J. A. G., July 30, 1914.)

CLERKS AND EMPLOYEES: Detail of; diversion of appropriations.

An officer of the Inspector General's Department desired the services of a stenographer while inspecting maneuver camps in Oregon, and the quartermaster at Portland, Oreg., offered the services of a stenographer from his office.

Held, that the detail of a clerk from the office of the quartermaster at Portland for duty with an inspector in making inspections of maneuver camps, would be a violation of section 3678, Revised Statutes, providing that—

“All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others”; but that there was no legal objection to the employment of said stenographer by the Inspector General's Department if the employment could be so arranged as not to conflict with his duties in the Quartermaster Corps.

(6-224, J. A. G., Aug. 6, 1914.)

CONTRACTS: Assignment of, to surety; payment to assignee.

A contractor, having become financially involved and unable to complete his contract, assigned the same, after a portion of the work had been performed, to the surety company on his contract bond, and executed a power of attorney to said company authorizing it to collect from the Government all amounts due and to become due for work done under the contract.

Held, that in view of the fact that the surety company had an equitable right to complete the work in default of the contractor and to have all moneys due applied to the discharge of the claims of labor and material men (*Richards Brick Co. v. Rothwell*, 18 App. Cases (D. C.), 516; *Marble Co. v. Burgdorf*, 13 *idem*, 506, 509), the assign-

HEAT AND LIGHT: Furnished to officers' quarters while on temporary duty with troops.

An officer on duty with troops at Laredo, Tex., with permanent station at Fort Thomas, Ky., occupied public quarters at Laredo suitable to his rank. He had closed his quarters at his permanent station. The act of February 27, 1893 (27 Stat., 478), provided that officers temporarily absent on duty in the field should not lose their right to quarters or commutation thereof at their permanent stations while so temporarily absent, and the act of March 2, 1907 (34 Stat., 1167), provided for furnishing at Government expense heat and light "actually necessary for the authorized allowance of quarters for officers and enlisted men."

Held, that while the law allowed, for the time being, a duplication of quarters to officers temporarily absent on duty in the field, one set at the officer's permanent station and another in the field, there was no authority for heating and lighting both sets of quarters at Government expense, but that the officer might be provided with heat and light for his temporary quarters where he was serving, if it were shown that no such allowances had been provided at Government expense for his quarters at his permanent station.

(72-310, J. A. G., Aug. 13, 1914.)

MARINES: Quartermaster stores supplied to, while serving with the Army; reimbursement of appropriations.

Certain marines who, by order of the President, were serving with the Army in Vera Cruz, Mexico, had been supplied by the Quartermaster's Department of the Army with quartermaster stores needed for their service. Section 1135, Revised Statutes, provided that—

"The officers of the Quartermaster's Department shall, upon the requisition of the naval or marine officer commanding any detachment of seamen or marines under orders to act on shore, in cooperation with land troops, and during the time such detachment is so acting or proceeding to act, furnish the officers and seamen with camp equipage, together with transportation for said officers, seamen, and marines, their baggage, provisions, and cannon, and shall furnish the naval officer commanding any such detachment, and his necessary aids, with horses, accouterments, and forage."

Held, that the appropriation for the Quartermaster Corps should be reimbursed from Marine Corps appropriations for supplies so furnished. Op. J. A. G., C 20461, Jan. 31, 1907; *id.* 5-242, June 1, 1914; 13 Comp. Dec., 529.

(5-242, J. A. G., Aug. 12, 1914.)

MILITIA: Organized; pay of, while attending encampment; rank above commission.

An officer of the organized militia was commissioned a first lieutenant in the quartermaster's department of the state, but by special order of the adjutant general's office of the state his commission, with that of certain other officers, was continued in force for state military

COMMUTATION OF QUARTERS: Assignment of, insufficient for family; station at place of duty.

An officer of the Ordnance Department of the Army was directed to "proceed to New York City, take station at that place, and report to the commanding officer of the Sandy Hook Proving Ground, N. J., for duty." At the proving ground there was a brick house owned by the Government and used as quarters for officers on duty there, which quarters consisted of one room for each officer, who also had the use in common with others of a dining room, a sitting room, and a reading room. The rooms were not adapted to the use of a family, and it was not permitted for officers to have their families there with them. The officer was furnished with quarters in this building of the character described. He had no duty to perform at New York City.

Held, that having no duty to perform at New York City, the order directing him to take station there could not operate to give him a right to commutation of quarters as at that place (7 Comp. Dec., 502), but that the actual station of the officer was at the place where his duties were to be performed (20 *id.*, 664). *Held further*, that quarters were the right of an officer for his personal use, and the Government was not obliged to furnish them for his family, nor was the availability for occupancy by a family the test of suitability of quarters; that the officer had been furnished with quarters (9 *id.*, 736); and that he was not entitled to the commutation paid him therefor.

(Acting Comp. W. W. Warwick, Aug. 25, 1914.)

CONTRACTS: Assignment of; payment to assignee.

The Treasury Department entered into a contract for the construction of a Federal building at Wahpeton, N. Dak. After a considerable amount of work had been done, permission was asked to transfer the contract to the contractor for another Government building, no change to be made in the terms of the contract.

Held, that while the transfer by one contractor to another of his rights under a Government contract in violation of section 3737, Revised Statutes, did not *ipso facto* annul the contract, but only gave the Government a right to annul the same, there was no authority for the officers of the Government to approve a proposed assignment or to recognize it in advance; that in the event of such transfer the Government might annul the contract and relet the work, or permit the work to be done by the contractor's assignee as his agent, the original contractor in either event to remain liable for any damages resulting from his failure to carry out the original undertaking; but that the department would not be authorized to pay the contract price to the assignee.

(Comp. Geo. E. Downey, Aug. 4, 1914.)

NOTE.—Where the assignment is to the surety on the bond of the contractor, see opinion of J. A. G. of August 10, 1914, page 3, *ante*; also 9 Comp. Dec., 43.

BULLETIN 46.

BULLETIN }
No. 46. }

WAR DEPARTMENT,
WASHINGTON, *October 24, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of September, 1914, and of certain decisions of the Comptroller of the Treasury and of the courts, is published for the information of the service in general.

[2194536 B—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CIVILIAN EMPLOYEES: Failure to pay debts; disobedience of order requiring specific payments.

Upon complaint of his creditor, a civilian employee of the War Department was ordered by the department commander to pay \$10 per month on the 1st of each month until he had settled an indebtedness of \$125. The employee, after making one such payment, claimed that he was unable to pay \$10 per month, and asked to be permitted to pay \$5 per month. This was refused, and he was ordered to continue the payments of \$10 per month. Subsequently, he was charged with failing to obey the last order. The employee's answer was in substance that he was unable to make the payments. His discharge was thereupon recommended for disobedience of the order.

Held, that the Secretary of War would not be justified in ordering the employee discharged for disobedience, without having clear evidence that he was able to make the required payments and willfully neglected to do so; that the department does not undertake to require employees to discharge their debts by the payment of any special amount, but regards the failure of an employee to settle a debt which he is able to pay and the nonpayment of which would result in complaints to the department as detrimental to the service and as indicating his unfitness therein, the same rule applying to civilian employees as to officers of the Army.

(16-433, J. A. G., Sept. 18, 1914.)

PRIVATE PROPERTY: Of retired soldier who died in Army hospital; disposition of; Articles of War.

A retired hospital steward, having been taken seriously ill in a hotel in San Diego, Cal., was removed to the post hospital at Fort Rosecrans, Cal., in a comatose condition, where he died the next day without regaining consciousness. Apparently he left no will and had no relatives. The commanding officer, holding that the personal property of the soldier should be disposed of as required by the 127th Article of War and Army Regulation 163 of 1913, declined to deliver it to the county public administrator, who had been appointed administrator to take over the estate and administer thereon under the direction of the probate court.

Held, that the action of the commanding officer and post surgeon in securing the effects of the deceased soldier and in forwarding the inventory to The Adjutant General of the Army, was correct; that the administrator appointed by the court was a legal representative within the purview of the 127th Article of War; and that the property should be taken outside the reservation and there turned over to the administrator, so as to bring it within the jurisdiction of the state. Dig. Op. J. A. G., 1912, p. 939 (g).

(6-155, J. A. G., Sept. 18, 1914.)

PUNISHMENT: Additional to sentence; conduct regulations.

By a conduct-grade classification in force at Fort Grant, Canal Zone, the enlisted men were divided into three classes, A, B, and C. Class A men were furnished permanent passes and allowed to be absent from the post, except when detailed for duty, from report until revcille; class B men were permitted to leave the post when not on duty by obtaining each time a regularly signed pass; and class C men, which included all who were undergoing company punishment or who had been recently tried, were restricted to the limits of the post. A private soldier was tried by court-martial and sentenced only to forfeiture of \$10 of his pay per month for three months. In the operation of said regulations he was to be confined to the limits of the post until the termination of the forfeiture.

Held, that the restriction of the soldier to the post as the result of his conviction by court-martial when his sentence involved forfeiture of pay only, was not authorized, as such restriction thereby increased the duly adjudged punishment in violation of a well-settled rule of military law; and that so much of the method of classifying men according to conduct at said fort as resulted in confining them to the post as a consequence of conviction by court-martial, in addition to a prescribed sentence, was contrary to military law and should be discontinued.

(30-750, J. A. G., Sept. 14, 1914.)

SUPPLIES: Purchase of; contractor's request for relief from contract on account of increased prices due to European war.

A bidder asked to be relieved from awards made to him for the supply of 1,300,000 pounds of oats under his bid of July 26, 1914, on the ground that after the acceptance thereof by the Government the

Held, that the fire was an "unforeseeable cause of delay" within the meaning of the contract (18 Comp. Dec., 438), and as the delay thus caused exceeded the delay in the completion of the contract above the contract time, the contractor could not properly be charged with damages for the delay.

(Acting Comp. W. W. Warwick, Aug. 31, 1914.)

DAMAGES: Unliquidated; breach of contract; jurisdiction of accounting officers.

A contract provided for the delivery of 20,000 pounds of frankfurters upon the U. S. steamer *Celtic* at the navy yard, Brooklyn, N. Y., by April 20, 1914. The vessel sailed before the date named for delivery, and a verbal understanding was entered into to the effect that the contracting company should hold the frankfurters for future delivery, the Government to assume any charges that might accrue thereon due to its inability to receive the goods on the date named in the contract. The claim was disallowed by the auditor on the ground that it "is one for 'unliquidated damages' which the accounting officers of the Treasury Department are not authorized to settle."

Held, that the claim was not for damages incident to the breach of the contract, but for services rendered at the request of the proper Government officer, who was competent to contract therefor and to agree with the contractor after as well as before the performance, as to the value of the services (*United States v. Corliss Steam Engine Co.*, 91 U. S., 321; 22 Op. Atty. Gen., 437; 6 Comp. Dec., 648; 14 *id.*, 589; 15 *id.*, 439; 16 *id.*, 504); and that the actual value of such services having been agreed upon by the parties, the claim presented, instead of being one for unliquidated damages, was a liquidated claim for the value of services actually rendered, which should properly be allowed and paid.

Held further, that under section 236, Revised Statutes, which provided that "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury" and the act of July 31, 1894 (28 Stat., 205-209), the accounting officers of the Treasury Department have jurisdiction, except where otherwise provided by statute, to settle all claims, whether liquidated or unliquidated; but they may not be able in some cases, because of lack of evidence or facilities to obtain it, to determine the justness of unliquidated claims, in which event such claims should be disallowed for that reason alone, and not on the ground of lack of jurisdiction; but *held further*, that the settlement of claims for unliquidated damages for torts involve no jurisdictional question in the accounting officers, and that such claims should be settled but should not be allowed, because they involve no proper legal charge against the Government.

(Comp. Geo. E. Downey, Sept. 9, 1914.)

REPAIRS: Damages to lighthouse tender by steamer of the Quartermaster Corps.

A lighthouse tender belonging to the Department of Commerce was damaged by a steamer belonging to the Quartermaster Corps, and a bill of \$70 was rendered in favor of a private concern for making the necessary repairs. A board of officers detailed for the purpose of examining into and reporting upon the case, recommended that no one be held responsible for the damage inflicted.

Held, that the repairs having been accomplished, payment of the bill should be made by the disbursing officer of the Department of Commerce upon presentation of proper vouchers, and that the amount could not be charged to or paid from funds of the Quartermaster Corps, as such repairs, subserving no purpose for which the funds were appropriated, would be without consideration, and as there was no appropriation of the Quartermaster Corps available for such purpose. 6 Comp. Dec., 74.

(Comp. Geo. E. Downey, Sept. 18, 1914; see also decision of Sept. 22, 1914, in the matter of replacing a beacon light destroyed by a tug of the Engineer Department.)

TRAVEL ALLOWANCES: Charge for space reserved in pursuance of transportation request.

A discharged soldier by means of a Government transportation request secured passage on a steamer en route to point of enlistment. About two hours before the steamer sailed he returned his ticket and canceled the passage. On account of the lateness in canceling the passage, it was impossible to resell the berth, although the steamer was booked full, and passengers had been turned away. A rule of the company provided that—

“When tickets are presented for redemption less than 48 hours in advance of sailing on crowded ships, and the accommodations so released can not be resold, a forfeiture of 50 per cent will be exacted. Such ticket may be refunded on this basis, or will be made valid for later sailings upon additional payment of 50 per cent of the regular passage rate.”

The regular passage was \$50, and the company presented its bill for \$25 in accordance with said rule.

Held, that the amount claimed was not damages for breach of contract, but was a fixed charge for space reserved and held for the soldier's occupancy, and was, in fact, for a service rendered, and that the amount should be allowed. *Held further*, that if transportation should thereafter be furnished to the soldier the amount of said allowance should be deducted therefrom.

(Comp. Geo. E. Downey, Sept. 28, 1914.)

TRAVELING EXPENSES: Of military attachés abroad; payment of; appropriation.

Appropriation was made by the act of March 2, 1913 (37 Stat., 704), under the heading “Contingencies, Military Information Section, General Staff” for “the actual and necessary traveling expenses incurred by military attachés abroad under orders from the Secre-

LIVING EXPENSES: Clerk of the Quartermaster Corps on temporary duty; Army Regulations.

A clerk of the Quartermaster Corps regularly stationed at Fort Riley, Kans., proceeded under orders to San Antonio, Tex., for temporary duty with the division to be formed there. On the date on which he arrived at his destination Army Regulation No. 744 of 1910 was in force, which provided that reimbursement for actual expenses, when traveling under orders, would be allowed to civilian clerks in the employ of any branch of the military service, among them the following:

"Cost of meals, and lodgings including baths, tips, and laundry work, not to exceed \$4.50 a day while on duty at places designated in orders for the performance of temporary duty."

Thereafter the Secretary of War approved a recommendation that the reimbursement mentioned be allowed for not more than 30 days, and that that period be made the limit of time for which such reimbursement should be paid to those who might thereafter be assigned to temporary duty at a place other than their permanent station, whatever the length of time of temporary service. This order was not carried into the Army Regulations, but notice thereof was communicated to the clerk before the expiration of the first 30 days of his assignment to duty at San Antonio.

Held, that the allowance, resting on regulation only, could be withdrawn by a modification of the regulation; that in making or changing Army Regulations the President might legally act through the Secretary of War; that the fixing of 30 days as the limit of temporary duty in said case was wholly within the discretion of said Secretary of War; and that the clerk had no legal claim for reimbursement for living expenses incurred beyond said period of 30 days.

(*Maxwell v. United States*, Ct. Cls. No. 31246, Feb. 9, 1914.)

NAVIGABLE WATERS: Riparian rights; paramount authority of the United States; harbor lines.

A riparian owner in the State of Virginia, where a fee-simple title runs to low-water mark in the bed of a navigable river, had constructed a wharf for shipping lumber out to a harbor line established by harbor commissioners under authority of a statute of the State. After the construction of said wharf the same harbor line was adopted by the Secretary of War on behalf of the United States, under authority of the act of August 11, 1888 (25 Stat., 425), as the National Government's limit of navigable water. Thereafter the Secretary of War established a new navigation or harbor line which brought a portion of said structures within the navigable area of the river, and the owner was notified of the change and of the necessity for the removal of such structures. Later the Secretary of War, assuming that the owner had taken the risk of a change in the line of navigation when it located its structures, abandoned condemnation proceedings which had theretofore been instituted and notified the owner of his intention to remove the portion of the structures which fell within the new line of navigation. A suit for an injunction against such proceedings was thereupon commenced.

Held, that all State laws and regulations with respect to navigable water, and all rights acquired under them, were subject to the paramount right of the United States to appropriate any portion of the submerged soil for the purposes of navigation.

Held further, that a harbor line established by the Secretary of War, under authority conferred by Congress, was subject to change by the same authority, and while a riparian owner might lawfully construct piers and docks to the established line, in doing so he takes the risk of such change if required for the improvement of navigation, which was not a matter for judicial inquiry, and that the removal by the Government of so much of his structures as extended beyond the new line was not a taking of his property for which he was entitled to compensation.

(*Garrison v. Greenleaf Johnson Lumber Co.*, U. S. C. C. A., June 1, 1914, 215 Fed. Rep., 576.)

BULLETIN 50.

BULLETIN }
No. 50. }

WAR DEPARTMENT,
WASHINGTON, *November 14, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of October, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2227416, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

W. W. WOTHERSPOON,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

APPROPRIATIONS: Special and general; limit on expenditures for hospitals.

In appropriating for "construction and repair of hospitals at military posts already established and occupied" in the Urgent Deficiency Act of June 25, 1910 (36 Stat., 664), a proviso was added that

"No more than sixty thousand dollars shall be expended in the erection of a hospital at the recruit depot at Angel Island, San Francisco."

The full amount authorized had been expended in the erection of such a building, but it was stated that the partitions of the annex were incomplete, with no finish of any kind, and that the main building lacked painting and interior finish. An allotment was desired from the appropriation for the construction and repair of hospitals for the purpose of completing said work.

Held, that the appropriation for the construction of the hospital was specific and was the only one that could be applied to the object named, and that it would not be legal to expend additional funds for the completion of the building from any other appropriation.

(5-061, J. A. G., Oct. 16, 1914.)

BIDS: For purchase of supplies; alteration of proposal after opening of bids.

A company, in response to an advertisement for proposals for furnishing stationery, wrapping paper, etc., during the fiscal year 1915, submitted a proposal which, as to all but one item, was qualified by

tion of his enlistment contract, the rule does not extend to amounts due under an enlistment prior to that from which he deserted, which enlistment had been closed by an honorable discharge, and that the amount due the soldier from his previous enlistment was not forfeited by the desertion.

(72-532.3, J. A. G., Oct. 8, 1814.)

EVIDENCE: Compelling a person to give evidence against himself.

It was proposed to order an officer to a certain place for identification by civilian witnesses in relation to charges which were pending against said officer.

Held, that such an order would not be in violation of the officer's privilege not to be required to give evidence against himself, as it calls for no testimonial communications from him. (*Holt v. United States*, 218 U. S., 245.)

Held further, that the absence of such officer from his command in obedience to the order would not be considered as such a detachment from his organization as would bring into operation the penalty clause of the provisions in the Act of August 24, 1912 (37 Stat., 571), with relation to the forfeiture of the pay of the superior officer by whose order or permission an officer should be detached, in violation of said act.

(6-124, J. A. G., Oct. 22, 1914.)

EXHIBITIONS: Exhibiting Government horses at horse shows; attending by organization.

A request was made that the War Department exhibit certain cavalry and artillery horses at the annual show of the Northwest Live Stock Association, to be held at Lewiston, Idaho, in December, 1914. The Army Appropriation Act of April 27, 1914 (Pub. 91, p. 15), in appropriating for horses for the Army, contains the proviso:

"That hereafter no part of this or any other appropriation shall be expended for defraying expenses of officers, enlisted men, or horses in attending or taking part in horse shows or horse races; but nothing in this proviso shall be held to apply to the officers, enlisted men, and horses of any troop, battery, or company which shall, by order or permission of the Secretary of War, and within the limits of the United States, attend any horse show or any State, county, or municipal fair, celebration, or exhibition."

Held, that horses belonging to organizations could be sent to such exhibitions at Government expense only when the organization to which they belonged was ordered or permitted to attend, and that the request in its limited form could not be complied with. Opin. J. A. G. (94-231, June 2, 1914.)

(94-231, J. A. G., Oct. 19, 1914.)

EXPOSITION: Expenses of officers and enlisted men with their mounts attending a mounted competition.

It was proposed to select three teams, one from each of as many different Army posts, composed of six officers and twenty-four en-

ters of officers, that fuel on account of an officer's allowance for heating his quarters could not be issued to his family at a place other than his permanent or temporary station, and that the proposed issues should not be authorized.

(72-311, J. A. G., Oct. 14, 1914.)

NOTE.—A letter from the Comptroller to the Secretary of the Treasury, to whom the above decision was rendered, advised the Secretary that the operation of his decision would be suspended until December 1, 1914, in view of the investigation being conducted by the War Department for the purpose of determining the value of the allowances for light, such determination to be followed by an amendment of paragraph 1057, Army Regulations, 1913.

INSANE PERSONS: Shipment and disposition of effects of insane soldiers after discharge.

An enlisted man who had become insane was removed from his station at Fort St. Michael, Alaska, to the Letterman General Hospital, San Francisco, Cal., and thence to the Government Hospital for the Insane, Washington, D. C., at which place he was discharged from the Army, but still remained an inmate of said institution. His household goods were retained at his former station the soldier having been unable to give any instructions in regard thereto.

Held, that the law did not authorize the shipment of any of the soldier's effects at Government expense after discharge, except such personal baggage as might be transported as his usual allowance on being returned to the place of enlistment on discharge, and that no authority existed for transporting the soldier's household effects from his former station to San Francisco, there to be retained in storage until he should be able to give direction as to their disposition. *Held further*, that, in view of the fact that if such property were left in storage indefinitely it would be subject to loss or deterioration, and in the absence of a duly appointed guardian, the Government might make such disposition thereof, without public expense, as might seem best for the interests of the soldier.

(44-000, J. A. G., Oct. 1, 1914.)

MILITIA: Eligibility for service in the organized; pensions for physical disability.

Section 1 of the Act of January 21, 1903 (32 Stat., 775), provided that:

"The militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age. * * *"

Held, that Congress not having defined the term "able-bodied" and not having fixed any standard of physical qualifications for entry into the organized militia other than is found in said expression, the determination of the state of fitness for membership in such militia rested with the recruiting officers of the States, acting under State

request for transportation to Baldwin, Miss., by way of Mobile, Ala., at a cost of \$8.32 above the cost of such transportation from Brownsville direct to Baldwin.

Held, that the additional expense was unauthorized, and that the officer issuing the request could not be released from his responsibility by the War Department but that it would be necessary for him to seek such relief from Congress.

(94-300, J. A. G., Oct. 16, 1914.)

TRAVEL EXPENSES: Of officers of the Army abroad; military attachés and military observers.

An officer of the Army was assigned to special duty at London, England, under the direction of the United States Ambassador, in connection with the relief of stranded Americans in England, when he was ordered by the Assistant Secretary of War through the United States Ambassador at Paris, France, to act as military observer. In pursuance of orders, he proceeded from London, England, to Paris, France, and thence to Neufchatel, and returned to Paris. He presented a bill for his actual expenses of travel, including hire of an automobile for a portion of his travel, rendered necessary by the fact that on account of the war trains did not proceed as far as he desired to travel.

Held, that while as a military observer, he was attached to the American Embassy at Paris, for purposes of official recognition he could not properly be regarded as a military attaché within the meaning of the provision of the Army Appropriation Act of April 27, 1914 (Pub. No. 91, p. 1), relative to the payment of "actual and necessary traveling expenses incurred by military attachés abroad under orders from the Secretary of War," and that he was entitled only to mileage for his travel and not to actual expenses. 17 Comp. Dec., 204.

(94-210, J. A. G., Oct. 29, 1914.)

VEHICLES: Passenger-carrying; motor cycles for the Signal Corps.

Section 5 of the Legislative, Executive, and Judicial Act of July 16, 1914 (Pub. No. 127, p. 61), provides that—

"No appropriation made in this or any other act shall be available for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for the service of any of the Executive Departments or other Government establishments, or any branch of the Government service, unless specific authority is given therefor, * * *."

Opinion was desired as to whether motor cycles purchased by the Signal Corps for use by telegraph linemen, repair men and orderlies came within the above statute. Said motor cycles were equipped for carrying linemen or repair men and their tools needed for the maintenance of lines in the field, and for the use of orderlies in carrying official messages, and were not equipped for carrying others than those engaged in the services named.

Held, that, considering the purposes for which the motor cycles were to be used, the same should not be regarded as passenger-carrying vehicles, within the meaning of the statute in question.

(94-012, J. A. G., Oct. 1, 1914.)

sponding rank of the Army, presented vouchers for the cost of electricity used by them in lighting their quarters, based upon the arbitrary allowances prescribed in paragraph 1057, Army Regulations, 1913, as amended by the Act of August 11, 1914. Officers of the Army were entitled by the Act of March 2, 1907 (34 Stats., 1167), to have provided them at Government expense the light actually necessary for their authorized allowance of quarters. The money values of the allowances prescribed by said regulation for lighting one room for one month between the 1st of September and the 30th of April at the rates of 85c. per thousand cubic feet of gas and 10c. per KWH. of electricity amounted to \$1.28 for gas and \$1.70 for electricity, and the same rates applied proportionately for the number of rooms actually occupied.

Held, that an inspection of the said rates in comparison with the known cost of lighting quarters in Washington, D. C., disclosed the fact that they were unreasonable, and in excess of the quantities actually necessary, and that the regulations prescribing such allowances were, therefore, in conflict with the law, and invalid. *Held further*, that the officers should pay the bills and present vouchers or claims for reimbursement to the extent of the cost of the quantities actually necessary to light their authorized quarters as occupied.

(Comp. Geo. E. Downey, Oct. 10, 1914.)

TRANSPORTATION: Hire of automobiles for officer traveling in mileage status.

An officer at Fort Sam Houston, Tex., was ordered to proceed "to Brownsville, Tex., on duty in connection with Mexican Federal prisoners and border patrol duty;" and, upon completion of this duty, to return to Fort Sam Houston. It was the officer's duty under the orders to inspect patrol stations along the Rio Grande River from Brownsville to Rio Grande City. Upon the officer's arrival at Brownsville it was found that recent storms had so damaged the roads along this route that he was obliged to hire and use an automobile for the trip, at an expense of \$7.50.

Held, that the officer's travel orders contemplated travel beyond Brownsville, namely, to the patrol stations along the Rio Grande River from Brownsville to Rio Grande City; that being in a mileage status he was entitled under the act of June 12, 1906 (34 Stat., 246), to seven cents per mile traveled and no more; that transportation which can be furnished an officer on a mileage status and charged against his mileage account is limited to transportation over established lines of common carriers; and that the expense of hire of extraordinary means of transportation, such as automobiles, is not authorized by law. (18 Comp. Dec., 851; 20 *Id.*, 485.)

(Comp. Geo. E. Downey, Oct. 31, 1914.)

TRANSPORTATION: Deduction on account of loss occurring in a prior shipment; delay in ascertaining the loss.

In settling an account of a transportation company, the Auditor for the War Department deducted \$14.13 as the cost of 108 pair of stockings, and freight thereon, being the shortage discovered in a prior shipment for the Government by the same company. The bill

BULLETIN 52.

BULLETIN }
No. 52. }

WAR DEPARTMENT,
WASHINGTON, *December 14, 1914.*

The following digest of opinions of the Judge Advocate General of the Army for the month of November, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2194536 C—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Brigadier General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CONTRACTS: For replacement of automobile tires failing to make guaranteed mileage.

The question arose as to the legality of a proposed agreement with the Goodyear Tire & Rubber Company for the replacement of defective automobile tires with new ones, the Government to pay, upon the delivery of the new tires, a sum equal to the value of the mileage obtained from the old ones, based upon a six thousand mile guaranty, the original tires to be returned to the company.

Held, that while in a transaction involving the exchange of worn-out Government property for new articles, the consideration allowed for the old property must be covered into the Treasury as miscellaneous receipts and the full value of the new supplies charged to the appropriation therefor, the proposed plan would not come within that requirement, the old property not being turned in on the basis of its value but in pursuance of an agreement of warranty; that such a plan appeared to be a sound business arrangement, which would result in economy to the Government, and no legal objection could be perceived to its adoption.

(76-743, J. A. G., Nov. 10, 1914.)

COURTS-MARTIAL: Member of court as witness for the prosecution.

It was provided by the act of March 2, 1913 (37 Stat., 722), that
“The commanding officer of a territorial * * * department
* * * may appoint general courts-martial whenever necessary;
* * * and no officer shall be eligible to sit as a member of such
court when he is the accuser, or a witness for the prosecution.”

of War that "No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer, when no field officer is present;" and of paragraph 147, Army Regulations, which provides that "A soldier on his discharge from the service, will be given a certificate of discharge signed by a field officer of his regiment or corps, or by the commanding officer when no field officer is present."

Held, that the term "regiment" in the 4th Article of War should be interpreted "regiment or corps"; that the term "field officer," according to lexicographers, denotes rank only, and not duty, signifying "a colonel, lieutenant colonel, or major"; and that therefore whenever an officer of either of such grades of any staff corps or department is present with a command, discharges of enlisted men of that corps or department may be signed by such officer.

(28-512, J. A. G., Nov. 23, 1914.)

HABEAS CORPUS: Expenses of officer and sergeant in producing prisoner in obedience to a writ of habeas corpus issued by a Federal Court.

A lieutenant at Fort H. G. Wright, New York, applied to the War Department for reimbursement of expenses incurred by himself and a sergeant in connection with the return to a writ of *habeas corpus* directed to the said lieutenant by a Federal District Court for the production of a soldier then a garrison prisoner whose mother sought his discharge from the Army on the ground of minority enlistment. The officers of the court held that there was no authority to compel the relator to pay the expenses, nor for the Department of Justice to pay them. No regular mileage orders were issued, but the lieutenant's commanding officer directed that he make return to the writ, and that the prisoner be taken under guard.

Held, that paragraph 999, Army Regulations, directing that a writ of *habeas corpus* issued by a United States court or judge shall be promptly obeyed is a recognition of the duty of the military to the United States Courts; that the lieutenant's custody of the prisoner and his duties as respondent in the case resulted from the military office he held; that his duty to produce the prisoner in court was, therefore, a military duty; that it was a military necessity to place the guard over the prisoner during the travel, and that as regular military orders might properly have been issued, the lieutenant's mileage should be approved and reimbursement made for the necessary travel expenses of the sergeant and prisoner.

(20-414.1, J. A. G., Nov. 17, 1914.)

OATHS: Authority of postmasters to administer oaths in respect to officers' returns of contracts to the Department of the Interior.

By Section 8 of the Sundry Civil Act of August 24, 1912, it was provided that—

"After June thirtieth, nineteen hundred and twelve, postmasters, assistant postmasters * * * are required, empowered, and authorized, when requested, to administer oaths, required by law or

SENTENCE: Of military court-martial imposed upon private, Marine Corps; remission of unexecuted portion after command transferred back to Navy Department.

A private of the Marine Corps had been tried by a military court-martial and given a disciplinary sentence. Before the sentence had been fully executed, the command to which the said private belonged was transferred back to the jurisdiction of the Navy Department, and it was desired that the unexecuted portion of his sentence be remitted.

Held, that the established rule of the War Department, recognized in paragraph 944, Army Regulations, was that the power of an officer to mitigate a sentence ceased when the person passed beyond the officer's jurisdiction, and that the principle applied *a fortiori* where the person had passed from the jurisdiction of the War Department. *Advised* that no reason was perceived why the Secretary of the Navy, as a representative of the President, could not remit the unexecuted portion of the sentence.

(30-840, J. A. G., Nov. 9, 1914.)

TAXATION: Of Government agencies by States; license and fees for operation of Government automobile.

Vouchers were presented for the payment to the Commissioner of Motor Vehicles for the State of New Jersey of \$3.75 for registration fee for a Government automobile used at Picatinny Arsenal, New Jersey, and \$2.00 for chauffeur's license for the operation of said automobile. The automobile was used by the War Department exclusively in the performance of Governmental functions.

Held, that the vouchers did not represent a proper charge against the United States, as the instrumentalities whereby the Federal Government performs its functions are not subject to State taxation. (15 Comp. Dec., 231.)

(90-125, J. A. G., Nov. 16, 1914.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTORS: Liability for failure to deliver supplies under agreement represented by proposal and award.

Prior to July 1, 1914, Miller, Clagett & Company, in response to advertisement by the Secretary of the Treasury under Act of June 17, 1910 (36 Stat., 531), submitted proposals for furnishing to the several Government establishments and departments in Washington, D. C., as required during the fiscal year 1915, various kinds of groceries. About July 1st, they were awarded the contract for many of the items, and a formal contract and bond were sent them for execution, which they failed or refused to execute. During October, the Government Hospital for the Insane ordered from them, and they delivered, supplies valued at \$1,991.89, according to prices in their accepted proposal. Thereafter, from the latter part of October, owing to the great rise in the price of groceries, they declined to fill

TRANSPORTATION: Of Organized Militia in connection with joint encampment with Regular Army; deductions under land grant acts.

The Court of Claims in *Alabama Great Southern Railroad v. United States*, May 18, 1914, No. 31872, rendered judgment for the claimants for \$2,447.90, which sum had been deducted by the Auditor for the War Department from claims of said railroad company for the transportation of members of the organized militia of Alabama and Mississippi to and from the joint camps of instruction of the Regular Army and organized militia held at Chickamauga Park, Ga., in the summers of 1908 and 1910, the amount so deducted being the amount authorized in accordance with the land grant acts and subsequent laws and decisions thereon to be deducted for the transportation of troops of the United States. The decision of the Court of Claims in this case was adverse to the ruling of the Comptroller in 16 Comp. Dec., 70, to the effect that the Organized Militia, when traveling for participation in joint encampment with the Regular Army is to be regarded as "troops" within the meaning of the Statutes relating to land grant deductions from regular rates for transportation of troops over certain railroads. The Department of Justice decided not to take an appeal to the Supreme Court from the judgment of the Court of Claims.

Held, that while the decision of the Court of Claims is not necessarily binding on the Comptroller in handling other cases of the same kind, yet his office would acquiesce and relieve claimants in this class of cases of the necessity of going to the Court of Claims, in view of the conclusion of the Department of Justice that the point involved ought not to be further contested and the fact that the Court of Claims would doubtless adhere to its decision in other like cases presented to it.

(Comp. Geo. E. Downey, Nov. 20, 1914.)

BULLETIN 1.

(Bulletin No. 52 is the last of the series for 1914.)

BULLETIN }
No. 1. }

WAR DEPARTMENT,
WASHINGTON, *January 15, 1915.*

The following digest of opinions of the Judge Advocate General of the Army for the month of December, 1914, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2246184, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

A. L. MILLS,
Brigadier General, General Staff Corps,
Acting Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY RESERVE: Eligibility of soldiers in Army Reserve to be examined for commission.

By the Act of July 30, 1892 (27 Stat., 336), it was provided "that all unmarried soldiers under thirty years of age, who are citizens of the United States, are physically sound, who have served honorably not less than two years in the Army, and who have borne a good moral character before and after enlistment, may compete for promotion under any system authorized by this Act."

Held, that this provision applied to soldiers in the Army Reserve created by the Act of August 24, 1912 (37 Stat., 590), as well as to soldiers on duty with their organizations.

(64-212.1, J. A. G., Dec. 7, 1914.)

BURIAL EXPENSES: Of indigent ex-Union soldiers dying in the District of Columbia.

An ex-Union soldier died in the District of Columbia in April, 1914, leaving no property. His widow received \$1,933.77 from a policy of insurance on his life made payable to her. She paid the expenses of his burial in Arlington National Cemetery, amounting to \$113, and afterwards made application for reimbursement of \$45 from the appropriation for "Burial of Indigent Soldiers" (Sundry Civil Act, approved June 23, 1913, 38 Stat., 31), which provided for the payment, not to exceed \$45 in each case, of the expenses for

the burial in Arlington National Cemetery, or in the cemeteries of the District of Columbia, of indigent ex-Union soldiers, sailors or marines dying in the District of Columbia.

Held, that life insurance not payable to the estate of the deceased is not a part thereof, and that the question as to whether the ex-Union soldier died indigent within the meaning of the Act of June 23, 1913, was not affected by the receipt of his life insurance by his widow.

(5-244.1, J. A. G., Dec. 9, 1914.)

CONTRACTS: Claim of contractor for extras not agreed upon in writing.

A contractor for the construction and repair of a wharf, after completion of the work and receipt of payment of the contract price, put in a claim for replacing two new fender piles that had been damaged by a government boat in making a landing while the construction work was in progress, and which were found to be defective. The quartermaster in charge, upon consideration of the terms of the contract providing for the replacing of defective piles and specifying that the contractor should cause no inconvenience to the landing of government boats, required that the piles be replaced as part of the contract. While the contractor demurred that it was not within the contract, he acquiesced in the requirement of the quartermaster and performed the work without previous written orders, or agreement as to the price, as provided by the contract for extras.

Held, that the decision of the Court of Claims in *Kilmer v. United States* (48 Ct. Cls., 180), was controlling, in which decision the court said (p. 194):

“In the case of *Ripley v. United States, supra*, the court held that in the absence of some provision in the contract therefor a contractor was not required to appeal. That ruling applies to the present case, and the final question therefore is, was the decision of the officer requiring the work to be done without a written agreement final? The contract does not in terms so provide. But it does provide that ‘no allowance shall be made for extra work claimed to have been done unless provided for beforehand by a written agreement specifying the cost of the same.’ Force and effect must be given to this provision, especially since there is no other provision of the contract or specification modifying the same or in conflict therewith.”

(76-741, J. A. G., Dec. 31, 1914.)

DETACHED SERVICE: Promotion while on staff duty.

A first lieutenant of cavalry while on duty in the field with his troop was, on October 7, 1914, detailed to perform additional duty as an acting adjutant of troops of his regiment, and on October 24, 1914, accepted a commission as captain of cavalry when he ceased to do duty as an officer of the cavalry troop but remained on duty as acting adjutant in the field.

Held, that the officer was after October 24th, and until he became assigned to and entered upon duty with a troop of cavalry, on detached service within the meaning of the law governing detached

in attending or taking part in horse shows or horse races with the qualification that—"nothing in this proviso shall be held to apply to the officers, enlisted men, and horses of any troop, battery, or company which shall, by order or permission of the Secretary of War, and within the limits of the United States, attend any horse show or any State, County, or Municipal fair, celebration, or exhibition."

Held, that the purpose of the provision was to prohibit the use of public funds for paying expenses for participation in horse shows, fairs, etc., except when the participation is organizational, and that there was no legal objection to permission being given by the Secretary of War for the order of the band and the entire troop of the 10th Cavalry to attend the New York Red Cross Horse Show, as requested.

(94-231, J. A. G., Dec. 2, 1914.)

MILITIA: Purchase of military supplies.

A lieutenant of a State Militia desired to purchase from the Engineer Corps, U. S. Army, a cavalry sketching board for use in instructing a militia cavalry troop.

Held, that Section 17 of the Act of January 21, 1903 (32 Stat., 778), was authority for making the sale of such articles for the use of militia troops, "at the price at which they are listed for issue to the Army, with the cost of transportation added," but that the request should be signed by the Governor of the State or by some one purporting to act by his authority.

(80-150, J. A. G., Dec. 2, 1914.)

POST EXCHANGE: Internal revenue tax.

By the Act of October 22, 1914, commonly known as the war revenue act, it was provided that—

"Dealers in tobacco * * * whose annual receipts from the sale of tobacco exceed \$200 shall each pay \$4.80 for each store, shop, or other place in which tobacco in any form is sold."

Held, that post exchanges, being Government agencies, are not required to pay the tax. (*Dugan v. United States*, 34 Ct. Cls., 458.)

(40-100, J. A. G., Dec. 30, 1914.)

The Act of October 22, 1914, commonly known as the war revenue act, enumerates in Schedule B various articles under the heading, "Perfumeries and cosmetics and other similar articles," which are required to have affixed thereto, on each container, an adhesive internal revenue stamp of the prescribed denomination, and further provides that such articles in the hands of dealers on and after December 1, 1914, shall be subject to the tax, but that "it shall be deemed a compliance with this Act as to such articles in the hands of dealers on and after December as aforesaid who are not the manufacturers thereof to affix the proper adhesive tax stamp at the time the packet, box, bottle, pot, or phial, or other inclosure with its contents is sold at retail."

TRANSPORTATION: Discharged soldier using transportation request as part payment of fare on through trip.

A soldier discharged at San Francisco, Cal., and desiring transportation to Somerset, Ky., was furnished a Government transportation request for transportation from San Francisco to Granger, Wyo., the ultimate point in the direction of Somerset, Ky., to which he was entitled to transportation. The railroad company would not accept the request in part payment for a single through ticket to Somerset at the regular through rate, but issued to the soldier a ticket to Granger, Wyo., and another ticket thence to Somerset, Ky., for which the soldier was required to pay the local rate of \$40.53. The value of the transportation from San Francisco to Granger was \$34.40, and the through rate from San Francisco to Somerset was \$53.60. The soldier contended that he should have been allowed the money value of his transportation request toward the payment of the through rate of \$53.60 and required to pay only the balance, or \$19.20. In a decision of August 14, 1914 (21 Comp. Dec., 76), the Comptroller held in substance that in honoring transportation requests issued to discharged enlisted men, a transportation company must adhere to the stipulations upon the requests by issuing transportation of the character specified therein and between the points named.

Held, that the railroad company, in taking up the transportation request and issuing a ticket thereon to the destination called for, did only what it was requested to do by the Government, and that the Comptroller had no jurisdiction to render an authoritative decision as to the right of the railroad company under the circumstances to collect from the soldier more than the regular through rate.

(Comp. Geo. E. Downey, Dec. 8, 1914.)

hernia . . .” Subsequently a claim was presented to the Medical Department on behalf of the hospital fund for reimbursement of \$10.40 for the patient’s subsistence while under treatment at the hospital from October 6 to 31.

Held, that the patient having ceased to be an employee of the transport service before his admission to the hospital and the disability for which he was treated having antedated his service, there was no provision of law or regulation authorizing the payment of the said expenses from public funds. *Held further*, that the hospital fund was entitled to reimbursement and that as the transport surgeon seemed to be responsible for erroneously causing the patient’s admission into the hospital as an employee of the transport service, he should be held liable for the payment of the claim.

(94-120, J. A. G., Jan. 12, 1915.)

CONTRACTS: Failure to accept bid within stipulated time limit; liability of guarantors.

Bids were invited and opened July 16, 1914, for the construction of 315 refrigerators. The bids were accompanied by guaranties to keep the bids open for acceptance for sixty days, and in default of the bidder to enter into contract in event of the acceptance of his bid within the sixty day period the guarantors were bound to pay to the United States the difference in cost, if any, in case of purchases elsewhere. The award was made, but not within the sixty-day period, and subsequently the successful bidder was adjudged a bankrupt and became unable to carry out the agreement.

Held, that the failure to accept the bid within the sixty-day period absolved the guarantors from all liability. *Held, further*, that there was no legal objection either to readvertising for new bids or to entering into a contract with the next lowest bidder if the latter were willing.

(76-240, J. A. G., Jan. 15, 1915.)

CONTRACTS: Liability of guarantors for failure of successful bidder to enter into and perform contract.

A bid for furnishing horses, dated November 2, 1914, accompanied by a guaranty to enter into a contract, as required, within five days after notice of acceptance, was accepted and contract and bond were sent to the bidder on November 20, 1914, for execution, which he failed or refused to accomplish. He proceeded, however, to deliver horses for inspection, and up to January 18, 1915, when the time limit for furnishing horses expired, he had produced about ninety animals, out of which number only nine were found acceptable. The bidder asked to be relieved from his obligation.

Held, that the condition of the guaranty was broken by the failure of the bidder to enter into contract, as required, “within five days after said notice of acceptance,” and that his guarantors were bound, to the extent of their undertaking under the terms of the guaranty, to pay to the United States the difference, if any, in money between

States, to the place where he is wanted by the civil authorities, of a soldier charged with an offense, but that a soldier is, in respect of extradition process, in the same status as though he were in civil life. (74-111.3, J. A. G., Jan. 26, 1915.)

HEAT AND LIGHT: Noncommissioned officer on temporary duty in the field not entitled to fuel allowance at his permanent station.

A regimental noncommissioned staff officer, on temporary duty with his regiment at Texas City, Tex., and entitled to one room as quarters, requested that his allowance of fuel be issued to his family at his permanent station. The Act of March 2, 1907 (34 Stat., 1167), provides for the allowance of heat and light for the authorized allowance of quarters for officers and enlisted men.

Held, that there is no statutory authority for an enlisted man to retain quarters at his permanent station while on temporary duty in the field, similar to that provided for officers by the Act of February 27, 1893 (27 Stat., 480), and that, therefore, the noncommissioned officer was entitled to his fuel allowance only at his place of service, where only he was entitled to quarters.

(72-411, J. A. G., Jan. 14, 1915.)

HEAT AND LIGHT: Pay clerks.

The question was presented whether a pay clerk, duly assigned to and occupying public quarters at a military post, is entitled to heat and light at public expense under the Act of March 2, 1907 (34 Stat., 1167), which provides for the furnishing of heat and light actually necessary for the authorized allowance of quarters for officers and enlisted men.

Held, that the pay and allowances of pay clerks of the Army are by statute (Act of Mar. 3, 1911, 36 Stat., 1044; and Act of June 24, 1910, 36 Stat., 606) made the same as paymasters' clerks and warrant officers of the Navy; that by the Act of March 3, 1901 (31 Stat., 1107), and section 1616, Revised Statutes, the latter are given the same allowances of quarters as are provided for a 2d lieutenant of the Army, but that no statutory provision is made for furnishing heat and light for their quarters at public expense.

(72-310.1, J. A. G., Jan. 20, 1915.)

PRIVATE BUSINESS: Officers engaging in.

A typewriter company inquired whether it was within the province of captains, lieutenants, sergeants, etc., to sell typewriters to their "fellow officers" on commission. *Held*, that such a practice would not receive the favorable indorsement of the War Department.

(6-127, J. A. G., Jan. 18, 1915.)

QUARTERS: Officer in command of disciplinary company, military prison.

By the Act of March 2, 1901 (31 Stat., 901), it is provided that the Secretary of War may determine what shall constitute travel and

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

PURCHASE OF SUPPLIES: Requirements as to advertising.

The Bureau of Mines purchased a gasoline truck after advertising and receiving five proposals for furnishing the truck in accordance with specifications. Subsequently, the need for another truck of the same character having arisen, the bureau purchased a second truck from the same company that furnished the first, at the same price. It was certified on the voucher for payment that the truck was purchased "under informal agreement, upon immediate delivery or performance," and upon "non-competitive quotation without advertising, by reason of impracticability to secure competition," there being, it was stated, "only one dealer from whom the articles can be obtained."

Held, that the certificate was not justified by the facts; that when the first truck was required five separate proposals were obtained for furnishing it, which showed that there was no lack of competition; that it cannot be concluded by one purchasing for the Government that a particular *make* of a needed article will be purchased, when other makers can furnish substantially the same article, and then from such conclusion adopt the further one that it is not possible to secure competition; that the requirements of Section 3709, Revised Statutes, as to advertising, are mandatory except where immediate delivery is urgent; and also that Section 3744, Revised Statutes, requiring all contracts of the War, Navy and Interior Departments to be reduced to writing and signed at the end thereof, should have been complied with.

(Comp. Geo. E. Downey, Jan. 6, 1915.)

STATE LAWS: Inspection of horses belonging to the United States at State lines.

The Southern Pacific Company put in a claim for reimbursement of \$60.40 for cost of inspection of horses belonging to the United States en route from various points to California and Arizona. It was contended that the State laws required the inspections to be made before the admission of the horses into the States; that it was the duty of the carrier to permit and pay for such inspection in order to facilitate the prompt delivery of the shipment to the consignees, and that the law requiring such inspection was within the police power of the States.

Held, that the police power of a State to safeguard the health and property of its inhabitants does not extend to the right of interfering with the instrumentalities of the Federal Government; that the requirement of the State laws of evidence of the inspection of the horses did not make it the carrier's duty to make or permit the inspection; that the expenses were, therefore, voluntarily incurred without benefit to the United States, and that the carrier could not legally be reimbursed from public funds.

(Comp. Geo. E. Downey, Jan. 14, 1915.)

OPINION OF THE ATTORNEY GENERAL.

(Digest prepared in the office of the Judge Advocate General.)

CONTRACTORS: Relief from performance of contract because of increased cost of contract supplies due to European war.

A firm which entered into a contract before the outbreak of the European war to furnish supplies to the Treasury Department petitioned the Secretary of the Treasury for relief from further performance of their contract because of the increased price of contract supplies due to the war. *Held*, that the contractors were obligated to perform the contract, if valid, if performance were physically possible; that the existing hardship gave them no right to avoid the obligation; that no executive officer has power to suspend, rescind or relieve from the obligation of a valid contract when either would be detrimental to the United States, however burdensome performance might be—especially where the added burden is not caused by the United States, and that in such cases relief can only be granted by Congress, which body alone has power to recognize a moral claim for relief.

(30 Ops. Atty. Gen., 301.)

BULLETIN 9.

BULLETIN }
No. 9. }

WAR DEPARTMENT,
WASHINGTON, *March 13, 1915.*

The following digest of opinions of the Judge Advocate General of the Army for the month of February, 1915, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2255370 A—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

TASKER H. BLISS,
Brigadier General, Acting Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CONTRACTS: Change in statutory requirements as to form.

In a decision of December 31, 1914 (21 Comp. Dec., 425), the Comptroller of the Treasury held that under Section 3744, Revised Statutes, contracts generally for the purchase of supplies or procurement of services for the Army were required to be reduced to writing and signed by the contracting parties at the end thereof, except as to emergency purchases, or where the amount for supplies or services did not exceed \$500 and immediate performance was contemplated. The effect of this decision is modified by the following provision of the Army Appropriation Act, approved March 4, 1915 (Pub. No. 292):

“That *hereafter* whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General.”

The effect of this legislation is to require formal written contracts in the Quartermaster's Department only where the agreement is not to be performed within 60 days and the amount involved exceeds \$500. Formal written contracts will not be necessary (a) where the amount involved does not exceed \$500, or (b) where, regardless of the amount, performance is to be completed within 60 days, unless required by regulations prescribed by the Quartermaster General.

only proper contract for their enlistment. *Held further*, that under the provisions of Section 1112, Revised Statutes, Indian scouts may be discharged "when the necessity for their service shall cease, or at the discretion of the department commander," since those provisions have not been repealed.

(6-150.1, J. A. G., Feb. 20, 1915.)

LICENSES: For the erection of buildings on military reservations.

The proprietor of a restaurant on a military reservation applied for insurance on the building in which he conducted his business, and the question was raised as to who held title to the building. The building was erected in 1909 by a restaurant company, with the permission of the post commander. The restaurant company having proved unsatisfactory, the post commander had the value of the building appraised by a board of officers, and it was sold at the appraised valuation. The purchaser subsequently made improvements and additions thereto, with the tacit approval of the commanding officer.

Held, that the question of title to buildings erected upon military reservations under licenses depends in each case upon the intent of the parties; that where licenses have been reduced to writing the question of title is not ordinarily difficult to determine, the general rule in such cases being that unless otherwise provided therein the title may be assumed to be in the licensee; that in the case of verbal licenses or permits, as in the instant case, while the controlling principle is likewise the intent of the parties, such intent is apt to be more difficult to determine, and must be gathered from the statements of the parties and the known circumstances; that in the instant case the fact that the company which erected the building was permitted to sell it indicated that it was the intention of the parties to the license that the title should be in the licensee, and hence the purchaser acquired the vendor's title; such license, however, being revocable and the building subject to removal at the pleasure of the executive authority.

(80-252, J. A. G., Feb. 2, 1915.)

LINE OF DUTY: Enlisted man injured while cleaning pistol.

An enlisted man on duty was injured by the discharge of a Government automatic pistol which he was cleaning preparatory for inspection. He had been on patrol duty and returned about 4.30 p. m. "He then looked after his mount, went to mess and returned to his tent to clean his arms for retreat inspection. He was fully under the impression that he had unloaded his rifle and pistol and found his rifle to be unloaded, which he cleaned first. He then proceeded to clean his pistol and it discharged, injuring him."

Held, that while the soldier was negligent in not assuring himself that his pistol was not loaded before he began cleaning it, under all the circumstances it was not regarded that his failure to do so amounted to culpable contributory negligence; and that his injury

RETIRED OFFICERS: Powers and duties when assigned to recruiting duty.

The question was presented whether a retired officer of the Army detailed to recruiting duty was authorized to administer oaths and execute depositions. Doubt arose because of the opinion of this office of November 14, 1914 (Bull. No. 52, W. D. 1914, p. 4), holding that a retired officer assigned to active duty and detailed as acting quartermaster and directed to take charge of the property and funds pertaining to the Quartermaster Corps at a post, could not be appointed summary court officer for the reason that the law authorizing the detail of retired officers on staff duty requires that it shall not involve "service with troops." The Act of April 23, 1904 (33 Stat., 264), authorizes the Secretary of War to assign retired officers of the Army, with their consent, "to active duty in recruiting" and, among other duties mentioned, to "staff duties not involving service with troops."

Held, that the statutory restriction that staff duty shall not involve service with troops does not apply to recruiting duty; that the language of the statute "active duty in recruiting" means that a retired officer so detailed shall perform the same duty as an officer on the active list so assigned, exercising the same power over and bearing the same relation to enlisted men at the recruiting station; that, being the only officer at a recruiting station, he constitutes the summary court-martial and is competent to administer oaths and execute depositions by virtue of the Act of March 2, 1913, which provides that "when but one officer is present with a command, he shall be the summary court-martial of that command and shall hear and determine cases brought before him."

64-219.22, J. A. G., Feb. 12, 1915.)

TRANSPORTATION: Excess shipments upon change of station.

An officer whose freight allowance upon change of station was 5,100 pounds, in changing stations from Fort Riley, Kans., to Schofield Barracks, H. T., shipped an automobile from San Francisco weighing 2,000 pounds. At a later date he shipped a piano from Fort Riley, Kans., weighing 935 pounds, and still later household goods weighing 5,042 pounds. The total weight of the shipments from San Francisco to Honolulu was 7,977 pounds, and from Fort Riley to Honolulu, 5,977 pounds.

Held, that the officer was chargeable only for the excess shipments as actually made, or for 2,877 pounds from San Francisco, and 877 pounds from Fort Riley, together with the additional expense, if any, incurred by the Government by reason of the excess shipment from San Francisco.

(94-233, J. A. G., Feb. 2, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the Office of the Judge Advocate General.)

CONTRACTS: Adjustment of mistake made in final payment.

In making final payment to a contractor for engineer supplies there was erroneously deducted as liquidated damages for a supposed delay of three days in making deliveries the sum of \$120. It was

of the hospital during the contract period; that it was for the hospital authorities to determine those needs; and that any determination of such needs which on its face did not appear to be unreasonable or capricious, or made without due regard for those interests of the contractor which general principles of law would protect and safeguard, would be accepted by the Comptroller as correct and binding upon the contractors; but that, inasmuch as it had been ascertained upon inquiry that during the contract period the hospital actually used only about 1,000 barrels of flour, and since the contractors had delivered 1,046 barrels, they had literally and in fact supplied all reasonable needs of the hospital for the full period covered by the contract, and that they were consequently not liable for the excess cost of the 250 barrels charged against them.

(Comp. Geo. E. Downey, Feb. 13, 1915.)

COURT-MARTIAL SENTENCE: When forfeiture of pay commences to run.

A soldier whose term of enlistment expired March 10, 1914, was retained to await the sentence of a general court-martial, which was promulgated in orders dated March 14, 1914, as follows:

"To be confined at hard labor at such place as the reviewing authority may direct for six months, and to forfeit ten dollars per month for the same period."

The soldier was discharged the service March 20, 1914. He had pay due him from January 1, 1914, and the question was presented whether on his final statements his pay for January and February was subject to a deduction of \$10 per month under the court-martial sentence.

Held, that the proper construction of the court-martial sentence meant that the execution of the forfeiture began with date of confinement, and that if the soldier entered upon his term of confinement under the sentence on March 14, 1914, the date of the promulgation of the sentence, the forfeiture of pay commenced on that date and ceased with his discharge on March 20, 1914, when his pay ceased.

(Comp. Geo. E. Downey, Dec. 31, 1914, and Feb. 6, 1915.)

NOTE.—See G. O. No. 70, W. D., 1914, p. 13, where the authorized form of sentence of forfeiture (in connection with a term of confinement) calls for the forfeiture to be "for a *like* period." Under this form of sentence, the period of forfeiture would begin, as prescribed in paragraph 976, Army Regulations, "*with the period for which pay has accrued since last payment.*"

EXCHANGE: Payment of salaries abroad.

The military attaché at Peking, China, as acting quartermaster for the payment of his own accounts during the period from October 1, 1912, to June 30, 1914, charged against the United States and paid to himself the sum of \$196.04 as the cost of exchange. For example, the officer stated his pay account for a particular month, including all allowances, at \$417.50, which he computed as equivalent to \$852.04, local currency, on the basis of the value of the Mexican dollar in

China, as published by the Treasury Department for customs purposes, and thereupon obtained from the International Banking Corporation at Peking that amount of money in exchange for his draft drawn on the Assistant Treasurer at New York for \$446.91; the difference between the latter sum and \$417.50 being regarded as the cost of exchange.

Held, that the officer was only entitled to his pay as fixed by law in United States Currency; that his check in payment thereof drawn on funds to his official credit should have been for the amount thus due, and that any excess was unauthorized; that while under certain circumstances exchange may be paid in the transaction of the public business abroad, there is no authority for it in the payment of salaries which are fixed by law.

(Comp. Geo. E. Downey, Feb. 6, 1915.)

HEAT AND LIGHT: Furnished family of officer on temporary duty.

An officer whose regular station was Texas City, Texas, was assigned to temporary duty at Vera Cruz, Mexico, during the months of July, August, September, and October, 1914. His family continued to occupy his quarters at Texas City.

Held, that the officer was entitled to have his heat and light allowance furnished to his family at his regular station provided he did not avail himself of such allowance elsewhere.

(Comp. Geo. E. Downey, Jan. 5, 1915.)

NOTE.—The note published on page 6 of Bulletin No. 50, W. D., 1914, should have been inserted on page 11, following the Digest of Comptroller's Decision of October 10, 1914.

BULLETIN 14.

BULLETIN }
No. 14. }

WAR DEPARTMENT,
WASHINGTON, April 12, 1915.

The following digest of opinions of the Judge Advocate General of the Army for the month of March, 1915, of certain decisions of the Comptroller of the Treasury and of the courts, is published for the information of the service in general.

[2255370 B—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Brigadier General, Chief of Staff.

OFFICIAL:

H. P. MCCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY ORDERS: Not revocable after executed.

An officer of the Medical Reserve Corps, after serving on active duty for more than a year, was notified by War Department order that his relief therefrom would take effect upon the arrival of a successor. The officer at the proper time complied with this order directing that he proceed to his home and stand relieved from active duty, but on the same date applied for a month's leave of absence that he had earned and not taken. It was recommended in the officer's behalf that the order directing his relief from active duty be rescinded in order that he might take advantage of the leave that he had earned. The Act of April 23, 1908 (35 Stat., 68), creating the Medical Reserve Corps, prescribes when officers of that corps may be called into active service, and provides for their relief from such duty "when their services are no longer necessary."

Held, that the order having been regular and valid its effect was to relieve the officer from active duty, and that the department had no power to revoke it so as to restore the officer to a duty status.

(2-100, J. A. G., Mar. 15, 1915.)

DESEPTION: Removal of erroneous charge after separation of soldier from the service.

A soldier while under a charge of desertion was discharged from the service of the United States on a surgeon's certificate of disability. The Department Commander subsequently issued an order

NAVIGABLE WATERS: Damages to wharf resulting from dredging operations.

The owner of a wharf on the river front in the City of Troy, N. Y., alleged that as a result of dredging operations carried on by authority of Congress in the river in front of his wharf the said wharf was damaged. He claimed that the Government was responsible and should restore the wharf to its former condition. He did not assert that the damage was the result of carelessness or negligence on the part of those executing the dredging operations, but contended that—

“Where the work contemplates damage to the property of individuals or where the damage is necessarily incident to the work, though unintentional, that damage should be repaired or compensated for as a part of the original plan and paid for out of the funds appropriated for the execution of that plan.”

On behalf of the Government it was shown that the dredging operations were carried on in conformity with the project adopted by Congress for the improvement of the river; that the excavations were confined to the natural channel; that the contractor used all reasonable precautions; and that the failure of the wharf was not due to carelessness on the part of the contractor but to the weakness of the construction and the failure of the owner to take proper steps to strengthen it after having been fully and seasonably advised of the possibility of damage.

Held, that as to structures situated waterward of high water mark on navigable waters as this one was, the cases are clear that they are subject to the consequences resulting from the exercise by Congress of the dominant right to improve the navigable waters, and that the Government is not liable for any damages resulting from the prosecution of such an improvement where such damages are purely consequential as in the instant case.

(62-853, J. A. G., Mar. 27, 1915.)

REWARDS: Not payable except in pursuance of a previous offer.

Four fishermen who found a drifting submarine mine in the ocean surf recovered it, and it was later taken possession of by the military authorities. On the question as to whether the fishermen could be paid a small reward,

Held, that as no reward had been offered, a payment as suggested would be in the nature of a payment for voluntary services and unauthorized in the absence of an express statute covering such cases.

Held further, that a reward for services of this character might be paid from the appropriation for contingencies of the Army in any case where the services were performed in pursuance of an offer of reward previously made.

(80-015, J. A. G., Mar. 18, 1915.)

TAXATION: Internal revenue stamp on soldier's baggage at customhouse.

The Internal Revenue Act of October 22, 1914 (38 Stat., 762), requires the payment of a stamp tax upon the “entry of any goods,

nection with its military service, and extends from the beginning of the process of securing men for the military service until they are returned after severance of said connection to the place where the initial steps for entering the service were taken.

(Comp. Geo. E. Downey, Mar. 24, 1915.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

CONTRACTS: Damages for breach and deduction from moneys due under subsequent contract.

A contractor for furnishing certain material for the use of the Panama Canal Commission in the construction of water systems in the Canal Zone failed to deliver the materials on contract time, the last delivery being about three months overdue. On account of such delay, the water systems were installed three months later than they otherwise would have been, and in consequence suitable drinking water had to be transported to the cities involved in tank cars at considerable expense. Other expenses were also incurred on account of the delayed deliveries. The contractor, however, was paid the full amount of his contract without deductions, there being no liquidated damage clause in the agreement. A subsequent contract was entered into between the same parties to furnish like material, and was duly performed, but in settlement the Canal Commission deducted the sum of \$1,000 as damages claimed to have been sustained by the United States on account of delay in the performance of the first contract. In an action by the contractor to recover, the Government set up a counter claim of \$8,182.34 as additional damages alleged to have been sustained under the first contract due to the delayed performance thereof.

Held, that the payment of the whole amount due under the first contract was a final settlement of all matters connected with that contract, and that the settlement could not thereafter be questioned except for fraud or mistake of fact, and there being no evidence of either, the counter claim could not be sustained, and the claimant was entitled to recover the \$1,000 sued for.

(*Camden Iron Works v. United States*, No. 30307, Ct. Cl., Mar. 15, 1915.)

CONTRACTS: Default of contractor; liability of surety; new contract.

Under a contract dated February 23, 1905, for the construction of a building for the United States, the contractor engaged to furnish all material and labor, and to complete the building on or before September 1, 1905, furnishing a penal bond in the sum of \$6,500 for the faithful performance of the contract. The United States was given the right under the contract, in the case of the contractor's default, to complete the work at the contractor's expense, "in which event" the contractor and his surety were to be further liable for any damages incurred through such default and any and all other breaches of his contract. The contract required the contractor to be

Held, that a pardon from the President, to be effective, must be accepted by the person to whom it is tendered; that the tender of a pardon from the President does not destroy the privilege of a witness against self-crimination, but he may reject the pardon and refuse to testify on the ground that his testimony may have an incriminating effect.

(*Burdick v. United States*, decided by the U. S. Supreme Court Jan. 25, 1915.)

PENALTY ENVELOPES: Furnishing to contractors for shipment of contract supplies.

An officer of the Quartermaster Corps inquired whether, in the purchase of small articles from a contractor whose obligation was completed as soon as the property was ready for shipment, it would be permissible to furnish the contractor with penalty envelopes to be used in forwarding the supplies by parcel post. It was pointed out that if such shipments could be made by parcel post under penalty envelopes, it would result in a considerable saving to the Government, it having been the custom in such cases to send the contractor a bill of lading covering the shipment at Government expense.

Held, that section 3 of the Act of March 3, 1879 (20 Stat., 352), providing in part "That any Department or officer authorized to use the penalty envelopes may inclose them with return address to any person or persons from or through whom official information is desired, the same to be used only to cover such information and indorsement relating thereto," is the only instance of specific authority for the use of penalty envelopes by private persons, and that according to a familiar rule of construction, it is to be taken as excluding their similar use in any other connection. See par. 837, A. R. 1913.

(22-020, J. A. G., Apr. 10, 1915.)

POST EXCHANGES: Dividends.

General Order No. 109, W. D., 1911, prescribes the method of distribution of net profits of post exchanges. When a dividend is declared, the fund is required to be distributed as therein directed, and as to Engineers, it is specified: "Where members belong to the Corps of Engineers, it will be paid to the Engineer Band." On the question whether a camp exchange at Texas City, Tex., consisting of a company or certain companies of Engineers was within the scope of this regulation and required to pay a share of net profits to the Engineer Band at Washington Barracks,

Held, that the camp exchange was not a regulation post exchange but was of an informal character created to meet special conditions where the advantages of a regular post exchange were not accessible; that as exchanges of this character are not required to comply with the general regulations in respect to their organization and operation, it would not be consistent to hold that they are within the operation of the provision concerning the payment of dividends.

(40-104.5, J. A. G., Apr. 19, 1915.)

TRANSFER: Of property no longer needed for purpose for which it was purchased.

It was proposed to transfer to the Signal Corps in Alaska a team of dogs belonging to the Bureau of Fisheries, Department of Commerce, at Copper Center, Alaska, for which the Bureau of Fisheries had no immediate use. On the question whether the dogs could be subsisted from the appropriation for "Regular Supplies, Quartermaster Corps." which in terms provides for the subsistence of animals "of the Quartermaster Corps."

On the questions as to what is to be considered as "pay" in such cases,

Held, that where a court-martial sentence directs the forfeiture of pay it means the rate of compensation as specifically fixed by law as pay proper, and does not refer to contingent allowances, extra duty pay, and the like; that the term "pay per month" used in Executive Order No. 2043 means the monthly rate of pay fixed by law for the grade in the service of the convicted person, and that a forfeiture of one day's pay, for example, requires that one-thirtieth of the monthly rate should be withheld. *Held further*, that where the sentence of forfeiture is to apply to future pay, and the rank of the soldier is changed during the continuance of such forfeiture period, resulting in a change in his rate of pay, there should be a corresponding change in the amount of the forfeiture.

(Comp. Geo. E. Downey, Apr. 28, 1915.)

HEAT AND LIGHT: Commutation thereof commencing July 1, 1915.

A provision contained in the Army appropriation act for the fiscal year 1916 provides:

"For commutation of quarters, and of heat and light, to commissioned officers, acting dental surgeons, veterinarians, pay clerks, members of the Nurse Corps, and enlisted men, \$640,000."

Held, that this provision is to be read in connection with the existing legislation of March 2, 1907 (34 Stat., 1167), providing that the heat and light *actually necessary* for the authorized allowance of quarters for officers and enlisted men shall be furnished at public expense, and that commutation of these allowances should therefore be in accordance with the commuted value thereof as determined and set forth, as to heat, in par. 1036, A. R., 1913, as amended by C. A. R. 21, Feb. 19, 1915; and as to light, as set forth in the following table (subject to the changes indicated in Sec. 3, par. 1057, A. R., 1913, as amended by C. A. R. 19, Feb. 10, 1915, for stations in Alaska, the tropics, and the south temperate zone):

Rooms.	April to September, inclusive, value per month.	October to March, inclusive, value per month.	Rooms.	April to September, inclusive, value per month.	October to March, inclusive, value per month.
10.....	\$3.24	\$5.16	5.....	\$1.62	\$2.58
9.....	2.88	4.62	4.....	1.44	2.28
8.....	2.70	4.32	3.....	1.26	2.04
7.....	2.40	3.84	2.....	.90	1.44
6.....	1.98	3.18	1.....	.72	1.08

(Comp. Geo. E. Downey, Apr. 28, 1915.)

NOTE.—The rates indicated are for the commutation of heat and light for the fiscal year 1916 for the number of rooms actually occupied, but not exceeding the authorized allowance. Voucher forms therefor are under consideration by the Comptroller and will be acted upon in due course.

proceedings for the soldier's discharge on the ground that the enlistment was void under Sec. 1117, Revised Statutes, which provides:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, that such minor has such parents or guardians entitled to his custody and control."

After the service of the writ of habeas corpus, but before the hearing thereon the soldier was arrested by the military authorities for fraudulent enlistment in violation of the 62d Article of War. Section 761, Revised Statutes, provides relative to habeas corpus proceedings that—

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as *law and justice require*."

Held, that while the parent or guardian who had not consented to the minor's enlistment could reclaim the custody of the minor, yet, in view of Sec. 761, Revised Statutes, it was deemed that law and justice did not require that he be taken from the military authorities until he had made amends to the United States for his offense of fraudulent enlistment.

(*United States ex rel. Laikund v. Williford* (C. C. A.), 220 Fed., 291.)

ARMY OFFICERS: Promotion; injunction suit.

The act of April 1, 1890 (26 Stat., 502), requires that promotions to every grade in the Army below the rank of brigadier general "shall, subject to the examination hereinafter provided for, be made according to seniority in the next lower grade." Plaintiff, a senior officer in the grade of Major, brought suit to enjoin the Secretary of War "from taking any action or steps of whatsoever kind in violation of plaintiff's right to be nominated by the President of the United States to the Senate thereof" to fill a vacancy in the grade and rank of Lieutenant Colonel.

Held, that no duty is imposed upon the Secretary of War in respect of the section of the act in question, which relates only to the action of the President; that the attempt to invoke judicial interference was in fact an attempt to reach the Executive through his representative, which may not be done; and that there was, therefore, no basis for judicial action.

(*Ray v. Garrison*, 42 D. C. App., 34.)

Held, that this provision does not apply to civilian employees in the government service, and that it was, therefore, permissible to purchase from a clerk in the Quartermaster Corps a "proprietary" product for cleaning shoes.

(76-331.4, J. A. G., May 12, 1915.)

SALVAGE: Rescue of drifting submarine mine.

A submarine mine belonging to the United States broke from its moorings and was found and rescued by fishermen. On the question whether the fishermen were entitled to salvage,

Held, that according to the weight of authority, only such property as pertains to a ship or its cargo is the subject of salvage, and that therefore the rescuers of the submarine mine could not properly be paid for their services upon a claim for salvage.

(5-400, J. A. G., May 4, 1915.)

TRANSPORT SURGEONS: Subsistence at public expense.

An officer of the Medical Corps claimed reimbursement for subsistence during a period that he was on duty as surgeon on an Army Transport, such claim being based upon the provision of Par. 164, Transport Regulations, for the subsistence of "contract surgeons (serving as transport surgeons); the ship's officers; * * * in their respective messes without charge."

Held, that there is no statutory authority for the provision in the Transport Regulations referred to for the subsistence without charge of contract surgeons serving as transport surgeons, or of any commissioned officer of the Medical Corps serving as transport surgeon, and that therefore the officer was not entitled to the reimbursement claimed.

(94-100, J. A. G., May 8, 1915.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CLAIMS: Loss of vehicle hired by Government employee.

An officer of the Indian Service, Department of the Interior, under instructions to visit a certain Indian Reservation for inspection purposes, hired a team of two horses and buggy to make the trip across country. In his return from the reservation, in attempting to ford a river after heavy rains, the team was swept down stream, resulting in the loss of the buggy, the horses being saved. There was no question that the officer did not exercise reasonable care and judgment in attempting to cross the stream. He considered that the interests of the Government required that he make the attempt. The owner of the buggy put in a claim against the Government for \$74 damages.

Held, that the officer was in a travel status, and was entitled to reimbursement of his actual traveling expenses under the act of March 3, 1875 (18 Stat., 452), excepting subsistence; that he was

deemed necessary to permit due notice being given disbursing officers so as to avoid possible occasions for disallowances.

(Comp. Geo. E. Downey, May 19, 1915 (21 Comp., 811), as amplified by decisions of June 4 and June 10, 1915.)

NOTE.—The effect of the above decision is to limit the payment of foreign-service increase of pay to pay plus longevity or service pay, including additional pay for certificate of merit, and the 50 per cent increase granted to enlisted men by the Act of July 18, 1914, who hold the rating of "aviator mechanic," and to exclude from the computation of said increase all additional items of pay. All decisions in conflict therewith are overruled.

TRANSPORTATION: Shipment of horses on change of station.

An officer on change of station had household goods and professional books aggregating 9,078 pounds, the shipment of which by the Government was more advantageous as a minimum car load of 12,000 pounds at \$60. The officer also had two horses for shipment at public expense under Par. 1098, A. R., 1913, which could have been shipped in the car with the other property without additional cost to the Government for freight charges, provided they had been shipped at the normal valuation of not more than \$100. Par. 1098, A. R., contained the provision—

"That the shipment shall be made at a valuation of not to exceed \$100 per animal, unless the owner pays, under the regulations of the Quartermaster Corps, the cost incident to increased valuation."

The officer placed a valuation of \$200 each on the horses, as a consequence of which, because of the higher rate of classification, it was necessary to ship them in a separate car at a cost of \$75, but upon the same Government bill of lading with the household goods and books.

Held, that as the cost over and above \$60 on account of this shipment was due to the action of the officer (owner), he, and not the Government, should bear the burden of it.

(Comp. Geo. E. Downey, May 4, 1915.)

STATE LAWS: Expenses for inspection of horses.

In carrying out instructions of the Quartermaster General of January 9, 1912, in regard to complying with State sanitary requirements governing the admission of live stock, the proper military authorities deemed it necessary in connection with the shipment of horses and mules from Vancouver Barracks, Wash., to points in California to engage the services of a veterinarian at Vancouver to inspect the animals and issue health certificates therefor. The Auditor for the War Department disallowed the payment to the veterinarian under the supposed authority of previous decisions of the Comptroller (21 Comp. Dec., 450, and others there cited), holding in substance that the instrumentalities of the United States employed in its proper functions are not subject to taxation by a State and that the requirement of the State law of the evidence of the inspection of horses "does not make it the carrier's duty to make or procure the inspection of Government horses en route."

Held, that where the Government acquiesces in the requirements of State laws in this regard and makes its own arrangements for inspection, as was done in the instant case, the expense therefor is properly payable from Army appropriations, and that the decisions relied upon by the Auditor were not applicable.

(Comp. Geo. E. Downey, June 12, 1915.)

TRANSPORTATION: Land-grant deductions for civilian employees.

In the settlement of the accounts of the Atchison, Topeka & Santa Fe Railway Company for transportation service, the Auditor for the War Department disallowed \$36.58 as land-grant deductions from claim for the transportation of two civilian employees of the Signal Corps from San Diego, Cal., to Washington, D. C. On appeal to the Comptroller, the company contended that—

"Civilian employees of this branch of the Army are not a part of the military forces of the United States subject to the orders of the Secretary of War, and can in no way be classed as troops of the United States, under the meaning of the land-grant acts. Such transportation is therefore not subject to land-grant deduction."

Held, that by the Act of February 2, 1901 (31 Stat., 748), the Signal Corps became a part of the Army; that it has been held for more than thirty years that the civilian employees of the Army are troops within the meaning of the land-grant acts, and that therefore the deduction was properly made by the Auditor.

(Comp. Geo. E. Downey, June 24, 1915.)

station and granted leave of absence before assignment to another, who receives an order of assignment before expiration of leave, is entitled to mileage from the place where he receives the order to his new station"; that while this regulation applies in terms to officers only, the principle should govern this case and that therefore the soldier was entitled to reimbursement of his travel expenses in an amount equal to what it would have cost the Government to transport him from the place where he received the order of March 18, 1914, to his proper station.

(Comp. Geo. E. Downey, June 2, 1915.)

Held, that since the officers were not detailed for the performance of *company* duties or sent in command of detachments from *their* companies, but for general duty with the detachment as a whole or as a single detachment from Fort Hamilton, which duty was not incident to nor flowed from their company relations, they could not properly be regarded as present for duty with their companies in the sense of the detached service law.

(6-124.22, J. A. G., Aug. 26, 1915.)

ENLISTMENT: Eligibility of applicant with record of commitment for truancy.

Paragraph 849, A. R., 1913, forbids the enlistment, among others, of persons "who have been imprisoned under sentence of a court in a reformatory, jail, or penitentiary."

Held, that this provision does not apply to commitments for truancy, and that therefore an applicant who "was committed for 422 days to the New York Parental School on account of truancy" was not ineligible for enlistment because of said commitment.

(34-081, J. A. G., Aug. 6, 1915.)

MAIL MATTER: As to registration and insurance.

In view of the ruling (Bul. 18, W. D., 1915, page 4) that there was no authority for furnishing stamps for parcel post insurance, the question was presented whether the registration of mail matter should be regarded as insurance and the issuing of stamps therefor governed by the said ruling.

Held, that the registration of mail matter is not for the purpose of providing ordinary indemnity insurance such as is contemplated in the case of insurance of parcel post packages, which are carried and treated as ordinary mail, but that the primary object of registration is to avail of the special or superior *service* designed to secure the safe delivery of the mail matter itself, the use of which service is well established in all branches of the Government, and that therefore postage might properly be furnished for the registration of mail matter when necessary in the Army service.

(5-240, J. A. G., August 12, 1915.)

OFFICERS: Examinations for promotion.

A first lieutenant who failed in a mental examination for promotion to the grade of captain and was suspended from further examination for a year, according to law, graduated from the Coast Artillery School during the said year of suspension, receiving certificates of proficiency in all subjects. He desired to know whether he would be exempt from further examination in the subjects covered by such certificates, and also whether he would be required to take examination in the subjects in which he qualified on his previous examination.

Section 3 of the act of October 1, 1890 (26 Stat., 562), provides, *inter alia*, that the President will prescribe a system of examination of all officers of the Army below the rank of major to determine their

Held, that the United States has a paramount right under the commerce clause of the Constitution to use the bed of navigable streams for any purpose designed to improve the navigation of the stream without compensation to the riparian owners, and that there was no obligation to make payment in this case.

(62-120, J. A. G., Oct. 27, 1915.)

TOURS OF DUTY LAW: Leaves of absence.

In reference to the act of March 4, 1915, providing that no officer or enlisted man of the Army shall, except upon his own request, be required to serve in a single tour of duty for more than two years in the Philippine Islands.

Held, that leaves of absence spent in the Philippine Islands by an officer serving there should not be omitted in reckoning the length of his tour of duty, but that any time during which he is absent from the islands, from whatever cause, may properly be excluded.

(92-400, J. A. G., Oct. 4, 1915.)

TRANSPORTATION: Gasoline for officer's private automobile used in Government service.

A first lieutenant in the Engineer Corps who had charge of a field detachment operating in two parties about five miles apart used his private automobile in the performance of his official duties, instead of a team of mules which he returned to the Quartermaster Corps. He requested that he be furnished gasoline and lubricating oil for his automobile, pointing out in support of his request the advantages accruing from the use of his automobile.

Held, that there is no authority of law for furnishing gasoline and lubricating oil for use in a privately owned and operated automobile; that Congress has provided the means of transportation for the Army which can not be varied; that the provision in the current Army appropriation act for the hire and operation of vehicles "required for the transportation of troops and supplies and for official, military, and garrison purposes," evidently contemplates that vehicles used in the public service, at public expense for operation, must be operated under the jurisdiction of the Government either as owned or hired vehicles. *Held further*, that the hire of the automobile from the officer in the instant case would be contrary to paragraph 521, A. R.

(94-012, J. A. G., Sept. 10, 1915.)

TRANSPORTATION: Officer's baggage allowance on change of station.

By an order of January 14, 1915, an officer with rank of captain was directed to change station from Washington Barracks, D. C., to St. Louis, Mo., effective March 1, 1915. On April 10, 1915, the officer was promoted to major with rank from February 28, 1915, or one day prior to his leaving for St. Louis under the orders mentioned. His household goods were not shipped until August 28, 1915, and the

Held, that the language "together with transportation in kind and subsistence as provided for by this act in the case of discharged soldiers" evidently was intended only to identify the general provisions of law applicable, and was not intended to limit the privileges and allowances of soldiers receiving furloughs to the Army Reserve to transportation in kind and subsistence, and that they are therefore entitled to receive two cents a mile in lieu of transportation in kind and subsistence, in the same manner as is provided for in the case of enlisted men upon their discharge from the service.

(Comp. W. W. Warwick, Oct. 16, 1915.)

AVIATION SERVICE: Pay of officer while on leave of absence.

The act of July 19, 1914 (38 Stat., 514), creating the Aviation Section of the Signal Corps and providing for the detail of officers thereto, grants a "junior military aviator" an increase of 50 per centum in the pay of his grade and length of service under his line commission "while on duty requiring him to participate regularly and frequently in aerial flights." The increase is 75 per centum in the case of "military aviators."

Held, that the right to the increased pay of 50 per centum, or 75 per centum, is dependent upon *duty* rather than upon *detail* alone, and that therefore an officer is not entitled to the increase for time during which he is on leave of absence.

(Comp. W. W. Warwick, Sept. 21, 1915.)

CHECKS: Issuance of second original, as distinguished from duplicate, when original is lost.

The question was submitted by the Secretary of the Treasury whether it is proper to permit a disbursing officer to issue a *second original* check when the original check is lost, stolen, or destroyed.

Section 3646, Revised Statutes, as amended (35 Stat., 643), provides in substance, *inter alia*, that whenever any original check issued by a disbursing officer has been lost, stolen, or destroyed, the Secretary of the Treasury may authorize the disbursing officer, after the expiration of six months and within three years from the date of the lost check, to issue a duplicate upon the execution of a prescribed indemnity bond; provided, that if the original check was not for more than \$50 a duplicate may be authorized after 30 days and within three years.

Held, that while disbursing officers are not prohibited by statute from assuming the responsibility resulting from the issuance of a second original check, the propriety of so doing is under the control of the accounting officers and not within the discretion of a disbursing officer, nor for the regulation of the department for which he is acting. *Held further*, that the procedure prescribed by the statute should be followed, and no second original check should be issued even though the lost check be one which the disbursing officer has drawn in his own favor.

(Acting Comp. Treas., Oct. 29, 1915.)

undertook to carry, and there being no question of negligence nor as to accuracy of the weight, the discrepancy in weight being entirely due to shrinkage from natural causes, the freight charges should be reckoned upon the initial weight at the point of shipment. There was nothing to the contrary in the contract of shipment.

(Comp. W. W. Warwick, Oct. 11, 1915.)

TRANSPORTATION: Excess baggage on change of station.

An officer on change of station had 13,915 pounds of household goods, professional books, and a surrey, loaded in one car and paid for on a carload basis at the rate of 56 cents per cwt. In addition he had an automobile weighing 1,600 pounds shipped in another car at \$2.52 per cwt. The officer's regulation allowance, including the professional books, was 7,690 pounds. It was contended that the proper method of determining the excess charges was to treat the shipment as an entirety and to proportion the aggregate expense on the basis of weight for which the Government and the officer each was responsible.

Held, that the officer's regulation allowance being less than a carload the cost required to be paid by the Government was the proportion of the car load shipment of which it formed a part, and that the excess consisted of 6,225 pounds loaded in the same car with the regulation allowance and the automobile loaded in another car.

(Comp. W. W. Warwick, Oct. 22, 1915.)

COURT DECISION.

(Digest prepared in the office of the Judge Advocate General.)

MARINE CORPS: Jurisdiction of naval court-martial to try marine for an act committed while he was detached for service with the Army.

A private of the Marine Corps, while his brigade was detached for service with the Army, committed an act made an offense both by the rules and Articles of War and by the laws and regulations for the government of the Navy. The next day his brigade was withdrawn from detached service with the Army and he was brought before a naval court-martial for trial, was tried, convicted, and sentenced for the offense as a violation of the laws and regulations of the Navy. At the trial he objected to the jurisdiction of the court upon the ground that at the time the offense was charged to have been committed he, as a private in a brigade of the Marine Corps, was serving with the Army, and that under section 1621, Revised Statutes, he was not subject to the laws and regulations of the Navy, which objection was overruled. He sued out a writ of habeas corpus.

Held, that the accused was not subject to the rules and regulations of the Navy when he committed the offense charged, and that a naval court-martial was without authority of law to impose or enforce the sentence pronounced.

(*United States ex rel. Davis v. Waller*, 225 Fed., 673.)

BULLETIN 39.

BULLETIN }
No. 39. }

WAR DEPARTMENT,
WASHINGTON, *December 7, 1915.*

The following digest of opinions of the Judge Advocate General of the Army, for the month of November, 1915, together with a collection of notes on military justice prepared under the direction of the Judge Advocate General of the Army, is published for the information of the service in general.

[2255370 J—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

CIVILIAN EMPLOYEES: Leaves of absence to attend military camps of instruction.

The question was presented whether Government employees desiring to attend business men's camps of military instruction might be permitted to do so on a pay status without having the time so spent charged against their regular annual leaves. It was pointed out that Government employees belonging to the Organized Militia of the District of Columbia enjoy such a privilege while on duty with the Militia. By section 49 of the District of Columbia militia act of 1889 (25 Stat., 779), it was provided that officers and employees of the United States and of the District of Columbia who are members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay or time, "on all days of any parade or encampment ordered or authorized under the provisions of this act."

Held, that the provisions of the act of 1889 referred to apply only to Government employees belonging to the National Guard of the District of Columbia, and that, there being no similar statutory provision in respect to other employees, any absence from duty for the purpose referred to would have to be charged against their annual leave or without pay if the annual leave be exhausted.

(58-400, J. A. G., Nov. 20, 1915.)

DESERTERS: Restoration to duty as affecting forfeiture of deposits.

In the case of a deserter sentenced to dishonorable discharge and to a term of imprisonment and who received an honorable restoration to duty under section 1352, Revised Statutes, the question was

BULLETIN 1.

(Bulletin No. 41 is the last of the series for 1915.)

BULLETIN }
No. 1. }

WAR DEPARTMENT,
WASHINGTON, *January 11, 1916.*

The following digest of opinions of the Judge Advocate General of the Army, for the month of December, 1915, and of certain decisions of the Comptroller of the Treasury and of courts, together with a collection of notes on military justice prepared under the direction of the Judge Advocate General of the Army, is published for the information of the service in general.

[2255370 K—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

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OPINIONS OF THE JUDGE ADVOCATE GENERAL.

A CORRECTION.

On page 8 of Bulletin No. 43, War Department, 1914, in the case reported under the heading "Reenlistment: After four years' service and passing to the reserve," insert the word "not" in the third paragraph, first line, between the words "had" and "been." The language should be, "*Held*, that a soldier who had *not* been reenlisted," etc.

ENLISTED MEN: As to making up lost time; Army Reserve.

In the case of enlisted men to be furloughed to the Army Reserve who have lost time from service by reason of absence without leave (Act of May 11, 1908, 35 Stat., 109), or by reason of the use of intemperate drugs, alcoholic liquors, etc., or confinement awaiting trial resulting in conviction (Act of April 27, 1914, 37 Stat., 590), the question was presented whether they were required to make up the time so lost before being furloughed to the Army Reserve, or after.

Held, that it was clearly the purpose of the acts mentioned to obtain from enlisted men the measure of *service* contemplated by their enlistment contracts; that the Army Reserve Act providing for seven-year enlistments requires a specified number of years' *service* and that a soldier is not eligible for furlough to the Army Reserve until he has completed the full *service* period of three or four years, as the case may be, including any time lost within the meaning of the above-mentioned acts.

(34-052, J. A. G., Dec. 13, 1915.)

PLEA OF GUILTY: Duty of president of court-martial respecting.

The records of the recent trials by general courts-martial disclose that in many cases the requirements of paragraph 8, General Orders No. 70, War Department, 1914, were not observed. In 154 cases consecutively reviewed 23 of the records showed the presidents of the courts to have failed in this respect. That paragraph requires, among other things, that in each case where the accused enters a plea of guilty the president of the court shall explain to him, first, the meaning of such plea, and second, the extent of the punishment to which the plea will subject him. Every commander exercising general court-martial jurisdiction is expected to exact a full compliance with these requirements; and in every case where the record shows a failure by the president of the court in this regard the reviewing authority should, without delaying action on the sentence therefor, require a written explanation by such president to accompany the record when it is forwarded to the Judge Advocate General.

hospital for treatment. No provision is made by law for the payment of commutation of rations to civilian employees, and it is expressly prohibited by A. R. 1229.

Held, that as the employee was entitled to rations under his contract of employment in accordance with A. R. 1203, the hospital should draw his rations in kind and remit the charge of 40 cents a day prescribed by A. R. 1460.

(5-242, J. A. G., Feb. 26, 1916.)

CLAIMS: As to compromise of Government claims.

A garbage crematory was protected by the contractor for one year under an indemnity bond against defects in material and workmanship. Within the year the Government made repairs at an expense of \$100. There was a disagreement whether the whole amount was chargeable against the contractor and it was proposed to *compromise* the claim by the payment to the United States of \$45, which proposition was reported by the local constructing quartermaster as a "fair offer."

Held, that if the contractor's liability was \$100, the War Department would have no authority to compromise by accepting a smaller sum, since claims in favor of the Government, other than those arising under the postal laws, can only be compromised by the Secretary of the Treasury under authority of Section 3469, Revised Statutes. (21 Opins. Atty. Gen., 494; 23 *Id.*, 631).

Held further, that if upon further consideration it be ascertained that the cost of the repairs properly chargeable to the contractor was \$45, and not \$100, it should be so reported and the case settled on the true basis.

(76-742, J. A. G., Feb. 10, 1916.)

COURTS-MARTIAL: Effect of sentence of dishonorable discharge upon prior unserved enlistment.

A deserter from the Army enlisted in the Marine Corps. His organization therein was detached for service with the Army, and during such service he was tried by Army court-martial and "dishonorably discharged the service of the United States."

Held, that the sentence to be "dishonorably discharged the service of the United States" was a complete expulsion of the enlisted man from the service of the United States and operated to terminate his unserved enlistment with the Army, although the court-martial knew nothing of his desertion.

(28-130, J. A. G., Jan. 13, 1916.)

EIGHT-HOUR LAW: Not applicable to chauffeurs.

Held, that a chauffeur is not within the purview of the eight-hour law which applies to laborers and mechanics.

(32-223, J. A. G., Jan. 22, 1916.)

days, when he returned to the post and received treatment by the post physician. Accounts were submitted for the payment by the Government of the hospital and physician's bills. By a provision contained in the appropriation item for the medical care and treatment of officers and enlisted men by civilian physicians or in private hospitals it is declared that "this shall not apply to officers and enlisted men who are treated in private hospitals or by civilian physicians *while on furlough*."

Held, that the accounts were not payable from public funds, not only because the officer was in a leave status, but also because it was not shown that the necessary treatment could not have been had under the facilities of the post, except, possibly, the first or emergency treatment.

(6-227.6, J. A. G., Feb. 19, 1916.)

PAY AND ALLOWANCES: Continuous service pay of enlisted men.

The question was presented whether a soldier serving an enlistment entered into on or after November 1, 1912 (the date the 7-year enlistment law took effect), must serve over 2 years or over 3½ years prior to a discharge for the convenience of the Government in order to entitle him, upon reenlistment, to be placed in a higher enlistment period with reference to continuous service pay. The Act of May 11, 1908 (35 Stat., 109), relating to continuous service pay, provides that "any soldier who receives an honorable discharge for the convenience of the Government after having served more than half of his enlistment shall be considered as having served an enlistment period within the meaning of this act," and the Act of August 24, 1912 (37 Stat., 590), establishing the Army Reserve contains the provision that "for all enlistments hereafter accomplished under the provisions of this act, four years shall be counted as an enlistment period in computing continuous-service pay."

Held, that the above mentioned provisions of the acts of 1908 and 1912 are *in pari materia*, the purpose being to regulate continuous service pay, and that as the act of 1912 declares that four years shall constitute an enlistment period in computing continuous service pay, the act of 1908 operates with reference to the said four-year period, and hence a soldier enlisted under the act of 1912 who receives an honorable discharge for the convenience of the Government after having served more than two years is entitled to be credited with an enlistment period for such service.

(28-231, J. A. G., Feb. 26, 1916.)

PENALTY ENVELOPES: Use of, in connection with the expenditure of company fund.

A company commander used penalty envelopes in conducting correspondence for the purchase from the company fund of beer for a special dinner of the company mess. The post-office authorities questioned whether such use of the penalty envelope was authorized as relating "exclusively to the business of the Government of the United States." (19 Stat., 319.) A company commander is required

posed expenditure, the chaplain went ahead and put a motion picture machine in operation and paid the cost from his own private funds. Upon his application to the War Department to be reimbursed, it was *held* that reimbursement could not be authorized in view of the ruling of the Comptroller of the Treasury that "the expenditure of private funds for supplies for the use of the Government is not authorized except under stress of urgent and unforeseen public necessity." (16 Comp., 519.)

(40-100, J. A. G., Jan. 10, 1916.)

STATE COURTS: Arrest of enlisted man in civil proceeding for debt.

Section 1237, Revised Statutes, provides:

"No enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted."

A writ for the arrest of an enlisted man was issued by State authorities in a civil proceeding for debt under the laws of the State relating to absconding debtors, the enlisted man sought being about to leave the jurisdiction under military orders.

Held, that the writ of arrest, not being in a criminal action but being an auxiliary process in a civil proceeding, and therefore *mesne* process, and the debt having been contracted *after* the soldier's enlistment, the arrest would be illegal in view of section 1237, Revised Statutes, *supra*.

Held further, that in case of a criminal prosecution and the issuance of a warrant of arrest of an enlisted man by State authorities, it would be the duty of the commanding officer, under the 59th Article of War, to interpose no obstacle to the arrest, but on the other hand to assist the civil authorities in executing the writ.

(14-233, J. A. G., Feb. 25, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CLAIMS: Reimbursement for expenses.

Two vouchers were submitted for decision as to their legality. The first was for \$15.01 in favor of the widow of a deceased officer "for hauling his personal effects from railroad station at Plainfield, N. J., to storage, per receipted bill." The second voucher was for \$3.25 for "reimbursement of expense incurred by payee, a clerk in the Medical Corps, U. S. Army, for cartage of his household goods, weighing 2343 lbs., from freight station to residence at Lyndhurst, N. J., upon change of station pursuant to orders."

Held, that there is no law, or regulation having the force of law, which makes provision for the reimbursement of a person, as in the two cases submitted, who hauls his baggage upon his own responsibility at his own expense; that if the hauling in question in both cases be a proper charge against the United States, it was an expense

HEAT AND LIGHT: Allowances under varying conditions to officer on commutation status.

In the case of an officer whose maximum allowance of quarters was seven rooms, decision was requested as to the proper basis of payment of commutation of heat and light under the following condition: At Washington, D. C., on duty October 1-10, 1915, he occupied private quarters consisting of 11 rooms, and October 11-15, 1915, he occupied private quarters consisting of 7 rooms. On October 15, 1915, he took station at the Medical Supply Depot, New York City, and occupied two private rooms until November 30, 1915, his family having continued to occupy private quarters consisting of seven rooms in Washington. On November 30, 1915, he left his station on leave of absence for two months, and during the month of December, while on leave of absence, he occupied quarters consisting of seven rooms in Washington, D. C.

Held, that the officer's maximum allowance of quarters being seven rooms and he having occupied that many or more October 1-14, he was entitled to commutation of heat and light for seven rooms for the said period; that from October 15 to November 30, having occupied only two rooms as quarters in New York, he was entitled to commutation of heat and light for only two rooms for said period; that he was entitled to no commutation for heat and light for the month of December, 1915, for the reason that no quarters were occupied by himself or his family at his official station during said period, and that there is no authority of law for furnishing heat and light for quarters occupied by an officer's family at any place other than his official station.

(Comp. W. W. Warwick, Jan. 31, 1916.)

PUBLIC PROPERTY: When shipping officer is responsible for loss.

A surveying officer designated to ascertain responsibility for the loss of a box of hats which was loaded with other property in a box car for shipment from Camp Stotsenburg to Manila, P. I., found and reported that the hats were stolen sometime after they were loaded into the car and before the car was sealed, and it was recommended that the railroad company be charged with the value of the hats.

Held, that as the car was loaded by the Government and had not been accepted and sealed by the railroad company, the shipping officer was responsible for the loss; that as the car was shipped sealed, it was his duty to protect the car until accepted and sealed by the railroad company.

(Comp. W. W. Warwick, Feb. 2, 1916.)

PURCHASE OF SUPPLIES: Requirements as to advertising in purchasing motor trucks.

A certain quartermaster having been authorized to purchase two light delivery trucks at a cost not to exceed \$1290 each, did not advertise for proposals, but "after obtaining prices, specifications, and personally examining into the merits, hill-climbing ability, and cost of maintenance and operation he decided that the ——— truck

the written order of a commanding officer, when such detail is for ten or more days."

Held, that while section 1235, Revised Statutes, was not intended to preclude a recovery of extra duty pay due where there had been a detail to extra duty by competent authority, although not in writing, and when extra duty entitling the enlisted man to extra pay under the statute had been actually performed, it was evident that the services for which the claimant sought extra compensation was not extra duty within the statute, inasmuch as he was on regular duty pertaining to the hospital service, which he as a member of the Hospital Corps was bound to perform without extra pay in accordance with the Act of July 13, 1892 (27 Stat., 120), which provided, in substance, that all necessary hospital services shall be performed by the members of the Hospital Corps.

(*United States v. Ross*, decided by the Supreme Court, Jan. 10, 1916.)

In *United States v. Lincoln C. Andrews* (decided Feb. 21, 1916), the Supreme Court of the United States affirmed the judgment of the Court of Claims allowing an officer of the Army half pay for time during a certain leave of absence granted in excess of the statutory allowance prescribed by Revised Statutes 1265, the War Department having granted the leave with half pay for a definite period and afterwards notified the officer that while his leave of absence was not revoked his absence thenceforth would be without pay.

The court held that the pay of an officer of the Army is a statutory incident of the office; that the statute prescribes the pay of an officer while on leave, and that it is beyond the power of the executive authority to grant a leave of absence on condition that the pay shall be other than what the statute prescribes; and further that the acceptance of a leave assumed to have been granted upon such condition does not constitute a legal waiver or estoppel.

In *Butler v. Sheriff of Columbia County, Florida* (decided Feb. 21, 1916), the Supreme Court of the United States reviewed the legality of a statute of the State of Florida, which is similar to that of the majority of the States of the Union, requiring citizens to work on the public roads. It was contended that the statute imposed involuntary servitude in violation of the 13th Amendment, and that its enforcement would deprive persons of their liberty and property without due process of law contrary to the 14th Amendment.

The court held that from Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads, the system having been introduced from England; that the 13th Amendment was adopted with reference to conditions existing since the foundation of the Government, and it introduced no novel doctrine with respect to services always treated as exceptional and "certainly" was not intended to interdict enforcement of those duties which individuals owe to the State, such as service in the army, militia, on the jury, etc." The court further held that there was no merit in the claim that a man's labor is property the taking of which without compensation by the State for the building and maintenance of public roads violates the due-process clause of the 14th Amendment.

DETACHED SERVICE: Officer performing staff ride exercises.

An officer who in the performance of staff ride exercises was accompanied by troops requested that he be credited with duty with troops for the period so engaged, under the act of April 27, 1914 (38 Stat., 357), which provides:

"Temporary duty of any kind hereafter performed with United States troops in the field for a period or periods the aggregate of which shall not exceed sixty days in any one calendar year * * * shall * * * be counted as actual presence for duty with such (troop, company, etc.) organization or command."

Held, that, as it is not essential to a staff ride that there be any troops present and that the presence of a small body of troops does not alter the character of the exercises, the officer was not entitled to credit for service with troops as requested.

(6-124.4, J. A. G., April 13, 1916.)

ENLISTED MEN: Promotion to grade of second lieutenant.

In the Act of July 30, 1892 (27 Stat., 336), providing for a competitive system of examination of enlisted men for commission as second lieutenants, one of the requirements of candidates is that they must have served honorably not less than two years in the Army. The Act of March 3, 1911 (36 Stat., 1045), prescribes that the order of appointments to fill vacancies in the grade of second lieutenant shall be, (1) cadets graduated from the United States Military Academy, (2) enlisted men whose fitness has been determined by competitive examination, and (3) candidates from civil life.

Held, in the case of an enlisted man who had not served two years in the Army, that he was not eligible for examination and appointment as of the enlisted men class, but that he was eligible for examination for appointment as of the civilian class, the term "candidate from civil life," etc., in the Act of 1911 evidently being intended to impose no other restriction than that of age limits, as it would be unreasonable to deny a man the right of appointment as a second lieutenant on account of his having had service in the Army as an enlisted man.

(64-213, J. A. G., April 18, 1916.)

PAY AND ALLOWANCES: Officer in arrest and confinement; deduction of pay.

An officer was adjudged in contempt of court in connection with divorce proceedings and confined in jail for several days until he had agreed to obey the decree of the court.

Held, that the officer was not entitled to pay for the time he was absent in confinement, as the case came within the sense of the prohibition of paragraph 1371, A. R.

(74-111.4, J. A. G., April 15, 1916.)

PRIVATE PROPERTY: Civilian clothing lost by enlisted men.

A chest containing the personal effects of an enlisted man was broken open while being transported, incident to the service, on a U. S. transport in charge of the Quartermaster Corps. Several

Held, that the provision in the act of March 4, 1915 (38 Stat., 1069), "for commutation of quarters, and of heat and light, to commissioned officers, * * *" contemplates the payment of commutation of heat to officers only where it is impracticable to furnish them fuel in kind, and that if the Government can and does furnish fuel in kind to an officer, whether occupying public quarters or quarters other than public, he is entitled to no commutation for heat and should be charged for only the fuel supplied him in excess of his authorized allowance for the quarters occupied.

(Comp. W. W. Warwick, March 9, 1916.)

PAY AND ALLOWANCES: Liability of soldier's deposits for indebtedness to United States and to post exchange.

A soldier who was discharged for fraudulent enlistment owed \$1.50 to a quartermaster laundry and \$3 to a post exchange, and the question was submitted whether these debts were properly chargeable against pay and clothing credits and, if not, whether they were a proper charge against a deposit of \$10 made by the soldier as shown by his deposit book.

Held, that the repudiation of the soldier's contract for fraud placed him in the position of having legally earned no pay or allowances, and having earned none there were none unpaid with which to pay his indebtedness to the laundry and post exchange, except that the laundry service having been performed by the government at public expense should be regarded as an advance of pay and the appropriation for the laundry should be reimbursed from the appropriation for the pay of the Army.

Held further, that the post exchange could not be reimbursed under the same principle nor could such indebtedness be satisfied from the soldier's deposits for the following reasons; viz: Section 1305, Revised Statutes, as amended (34 Stat., 246) declares that soldiers' deposits shall be exempt from liability for their debts. This exemption has been held not to apply to any indebtedness to the United States (16 Comp. Dec., 566), but an indebtedness to a post exchange is not an indebtedness to the United States and the Government assumes no liability therefor further than to use a part of the soldier's pay, if there be any, to protect the exchange. Therefore, the inhibition in section 1305, R. S., that deposits shall be exempt from liability for the soldier's debts applies to any indebtedness which is not an indebtedness to the United States, and as a post exchange, in the purview of this statute, is on the same footing as an individual, the soldier's deposits and interest were payable to him without diminution on account of such indebtedness.

(Comp. W. W. Warwick, April 20, 1916.)

NOTE.—Paragraph 1368, A. R., will be amended so as to conform with the above ruling.

TRANSPORTATION: Excess baggage on change of station.

In the shipment of an officer's baggage on change of station an automobile was loaded in the car with household goods and professional books. The excess weight of the officer's baggage allowance consisted of 1,370 pounds of household goods and the automobile weighing 2,000

BULLETIN 18.

BULLETIN }
No 18. }

WAR DEPARTMENT,
WASHINGTON, *July 8, 1916.*

The following digest of opinions of the Judge Advocate General of the Army for the months of May and June, 1916 (two opinions printed in full), and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2422420, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

JUNE 5, 1916.

MEMORANDUM for The Adjutant General.

Subject: Construction of certain provisions of the national defense act approved June 3, 1916.

Upon the questions submitted by you in your memorandum of the 24th ultimo, I heretofore, as you know, came to certain tentative conclusions with which I acquainted you. In the light of your recent supplemental memorandum concerning these tentative conclusions, which I have considered with great care, I am now prepared to make official response to your inquiries, for the purpose of setting them out in the language in which they are expressed and considering them in the order submitted:

FIRST.

“Details in staff departments.—The present law provides that an officer detailed in The Adjutant General’s Department with the grade of major, on promotion to the grade of lieutenant colonel, may be redetailed in the department without regard to the detached-service law for other periods of four years. Does the language of this act, providing that when an officer is so promoted ‘he may be permitted to serve out the period of his detail,’ repeal the present provisions of law?”

It is my opinion that the provision of the bill to which you refer relates not to the detached-service law, but solely to the provisions of law fixing the number of officers of the grade to which the detailed officer is promoted in the staff corps in which he is serving, and serves to increase temporarily that number so as to permit of his retention if desirable.

ments are in no respect to be governed by seniority among the four eligibles, and that any one of them may be appointed to any one of the field offices without regard to his rank as to the other three.

In this connection I may also say that in the absence of a more specific inquiry I do not now consider, as I do not perceive the relevant effect of, the last proviso, to which my attention was invited.

THIRD.

“Examination of field officers.—In section 24 it is provided ‘that the provisions of existing law requiring examinations to determine fitness for promotion of officers of the Army are hereby extended to include promotion to all grades below that of brigadier general.’ It is further provided ‘that all vacancies created or caused by the foregoing provisions of this section in grades above that of second lieutenant shall be filled by promotion according to law existing on and before the date of approval of this act, and subject to the examinations prescribed by existing law.’ These two paragraphs of the bill are in conflict. To show the practical effect of these provisions, the number of lieutenant colonels of Infantry, for example, promoted to the grade of colonel due to the detached list is ten. The number of promotions from lieutenant colonel to colonel, due to the increase in the Infantry arm, on July 1, 1916, by seven regiments, is seven. The literal interpretation of the two provisions of the act would apparently require ten lieutenant colonels of Infantry to be promoted as now provided by law without examinations and eleven to be promoted with examination.”

The difference of language is too manifest to be disregarded or composed. There is no conflict between a rule which requires an examination in one case and not in the other. It is a matter of difference, not conflict. Therefore there is no room for interpretation. Where legislative language is so plain, we do not have to seek the legislative reasons for the different rules, though the suggestion does come that Congress conceived that the detached service list should be organized first and desired to avoid the delay due to the examinations; and perhaps also that, inasmuch as senior officers for the most part will be promoted to the grades of lieutenant colonel and colonel on that list, a presumption of demonstrated competency was made in their favor. Upon the other side it may have been presumed that there would be of necessity some delay in establishing the new organization, affording, without prejudicing the service thereby, an opportunity for examination for the vacancies due to the increments.

Such was my tentative view, and upon a careful reconsideration I am not convinced of any error therein, notwithstanding the reasons advanced in your supplemental memorandum for a contrary conclusion. You say that—

“The act specifically provides for the promotions incident to the detached list and those due to the first increment in organizations of the Army to become effective at the same time, July 1, 1916; and this office can not agree with the suggestion that Congress conceived that the detached service list should be organized first. It is suggested that that portion of the presumption be omitted from the discussion, leaving it to the Secretary of War to determine adminis-

have, therefore, the qualifications prescribed by existing law for enlisted men. See act of July 30, 1892 (27 Stat., 336). It would follow, then, that only those officers of the scouts who are citizens of the United States or have declared their intention to become such and who possess the other prescribed qualifications are eligible to this class.

I first thought that inasmuch as the substantive part of the provision used the term "enlisted men, including officers of the Philippine Scouts," and the proviso used simply the term "enlisted men," omitting the words "including Philippine Scouts," Congress thus indicated a distinction between the two as to eligibility based upon service. But you very properly say:

"It seems that if the officers of the scouts are to have the qualifications prescribed by law for enlisted men, they should have the same length of service among other qualifications."

Upon further consideration, I think that is the result to be reached upon fair construction, notwithstanding the difficulty of the language indicated. Certainly the provisions establishing eligibility ought to be liberally construed in behalf of the beneficiaries. Furthermore, it could well be maintained that inasmuch as the substantive part of the provision established an order consisting of both enlisted men and officers of scouts—the word "including" being used thus cumulatively—the proviso has reference to all included within the order, and that its sole purpose was to change the rule from the present two years' to one year's service without discriminating as between the classes constituting the order.

FIFTH.

"*Transfer of officers (sec. 25).*—The bill provides for the promotion or transfer without promotion of officers of one branch of the line of the Army to another below the grade of lieutenant colonel, subject to certain examinations. Do officers so transferred take their place in the lineal list of the arm to which transferred according to relative rank existing at the time of transfer?"

In my judgment the officers transferred in accordance with the provision should take their place in the lineal list of the arm to which transferred according to their relative rank at the time of the transfer. I reach this conclusion principally for the reason that it is expressly declared that the transfers provided by this section are "for the purpose of lessening as much as possible inequalities of promotion due to the increase in the number of officers of the line of the Army under the provisions of this act"; that is to say, that in making these transfers the inequalities of promotion that are not brought about by the increases due to this act should not be admitted to consideration. On principle, and having in view the restricted purpose of the transfers here authorized, I can see no reason why the officers transferred for this purpose should have their relative rank disturbed; indeed, I do not see how their relative rank could be disturbed except upon considerations based upon inequalities due to increases not caused by this act. However, for the present, I can look at the question only as it is presented; that is, in its large and indefinite outlines; and it may well be that administrative and other proper considerations may arise to suggest, if not require, modification of this general view.

carrying the minor fractions forward for future adjustment. I can not conceive of the slightest reason why in the example cited such regard should not be had for the major fraction so that, applying the rule, the bureau mentioned would be entitled to the increase of one colonel upon the third increment. Additional support for this view is to be gathered out of the act, wherein it requires that the increments shall be one-fifth of the total.

(64-221.4.)

E. H. CROWDER,
Judge Advocate General.

JUNE 19, 1916.

MEMORANDUM for the Chief of the War College Division of the General Staff.

Subject: Interpretation of section 111 of the national defense act of June 3, 1916.

1. Your memorandum of June 17 requests an opinion on certain questions which will be hereinafter stated in connection with the answers thereto.

2. Question 1:

“Will the National Guard when drafted into the Federal service, as provided in sec. 111, act approved June 3, 1916, be available for an offensive campaign in Mexico?”

Section 111 of the national defense act provides:

“When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, *draft into the military service of the United States*, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, *stand discharged from the militia*, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct * * *.”

The power of Congress to provide for drafting into the Army of the United States the citizens of the country capable of bearing arms was exercised during the Civil War, and its right to do so was upheld by the courts. The persons so drafted, though drawn *from* the militia, were not called forth as such under the militia clauses of the Constitution, but were incorporated into the armies of the United States under the constitutional power to raise armies. (*Kneedler v. Lane*, 45 Pa. St., 238.) Section 111 provides that the persons drafted pursuant to its provisions shall “stand discharged from the militia,” thus clearly indicating that the persons so drafted shall be no longer regarded as militia but as a part of the Army of the United States. Being no longer militia their employment is not restricted to the purposes for which the militia as such may be employed—the execution of the laws, suppression of insurrection, and repelling of invasion. They are subject to the orders of the President of the United

act. It may be here observed, however, that enlistment in the Volunteer Army, is a voluntary matter, and the President can not compel the National Guard organizations to enter the same.

(58-141.)

E. H. CROWDER,
Judge Advocate General.

ARMY RESERVE: Furlough of enlisted men indebted to the United States.

The following questions were submitted:

"Should a man who is otherwise eligible be furloughed to the Army Reserve at the expiration of *three years'* service, under the following conditions:

"(a) When he is indebted to the United States for court-martial fines.

"(b) When any other indebtedness of the soldier to the Government exceeds amounts due him."

The act of August 24, 1912 (37 Stat., 591), providing for a seven-year enlistment—the first four years to be with the colors and the last three years on furlough and attached to the Army Reserve—contains the proviso that an enlisted man, at the expiration of *three years'* continuous service with his organization—

"upon his written application, may be furloughed and transferred to the Army Reserve in the discretion of the Secretary of War."

Held, that the statute, which gives the Secretary of War discretion to furlough the soldier, does not mean that the transfer must necessarily be effected immediately after the expiration of the three years' service, and that if some obstacle intervenes the furlough may take place as soon thereafter as practicable upon the removal of the obstacle.

Answering the questions specifically:

(a) The Secretary of War may either furlough the soldier to the reserve immediately after the completion of the three years' service with his organization, remitting the unexecuted part of the forfeitures imposed by sentence of court-martial, or may grant the soldier's application to be furloughed to the reserve to take effect immediately after the forfeitures have been fully executed.

(b) Where the indebtedness of the soldier to the Government, not including court-martial forfeitures, exceeds the amount due him the grant of the soldier's application to be furloughed to the reserve should be deferred until sufficient pay accrues to satisfy his indebtedness to the Government.

(72-530, J. A. G., May 15, 1916.)

CHIEF MUSICIAN: Power of regimental commander to reduce to ranks.

The question was submitted whether a chief musician of Cavalry could be reduced to the ranks by the regimental commander.

Held, that such musicians obtain their grade, like other noncommissioned officers, by enlistment as private and subsequent appointment (act of Mar. 2, 1899, sec. 2, 30 Stat., 936), and it follows that they may be reduced to the ranks in like manner as other noncommissioned officers, viz, by sentence of court-martial or by order of the commanding officer having authority to appoint them.

(6-151.1, J. A. G., May 19, 1916.)

service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of major: *Provided*, That the total number of dental surgeons with rank, pay, and allowances of major shall not at any time exceed fifteen: *And provided further*, That all laws relating to the examination of officers of the Medical Corps for promotion shall be applicable to dental surgeons."

By section 127 it is provided that "nothing in this act shall be held or construed so as to discharge any officer from the Regular Army or to deprive him of the commission which he now holds therein." The provisions of the act of March 3, 1911 (36 Stat., 1054), for the organization of the Dental Corps are not regarded as repealed by the new act and both statutes should therefore be construed together and the former act be given force except where it appears to be modified by the national defense act. In respect to the above provisions of the new act, questions were submitted and answered as follows:

(a) May the President issue commissions as dental surgeons to the present acting dental surgeons who are within the designated age limits, such commissions to be effective from the date of the approval of the new law? *Answer*: Yes. As the number of dental surgeons authorized by the new act corresponds to the total number of both grades under the act of March 3, 1911—that is, not to "exceed the proportion of one to each 1,000 enlisted men of the line of the Army"—this evidences the purpose of Congress to supersede the grade of acting dental surgeons.

(b) In issuing and making such appointments, may the President, in his discretion, require preliminary examination similar to that prescribed in section 16 as preliminary to the appointment of present veterinarians in the Veterinary Corps? *Answer*: The President may require an examination preliminary to the appointment of acting dental surgeons to the commissioned grade of dental surgeons, in view of the provisions of the act of March 3, 1911, which is regarded as still in force, declaring that:

"Acting dental surgeons who shall serve three years in a manner satisfactory to the Secretary of War *shall be eligible for appointment as dental surgeons*, and, *after passing in a satisfactory manner an examination which may be prescribed by the Secretary of War*, may be commissioned with the rank of first lieutenant in the Dental Corps to fill the vacancies existing therein."

(c) May acting dental surgeons over 27 years of age be appointed or commissioned as dental surgeons? *Answer*: Yes. The act of March 3, 1911, provided for the eligibility of acting dental surgeons "for appointment as dental surgeons" under the conditions prescribed therein, and prescribed the age limits for appointees as acting dental surgeons to be "between 21 and 27 years." It was evidently contemplated that they, having been appointed between the age limits, should be eligible under the conditions specified for appointment as dental surgeons, although over 27 years of age, and this provision should be construed in connection with the present statute so that both will have operation—the age limits prescribed in the act of March 3, 1911, to apply to the eligibility of appointment of existing acting dental surgeons as dental surgeons and the age limits prescribed in the national defense act to apply to all other appointments as dental surgeons.

ENLISTED MEN: Indebtedness to the United States standing from former enlistment.

The question was presented whether an enlisted man is liable for any indebtedness to the Government contracted during his preceding enlistment.

Held, that the War Department is without authority voluntarily to waive an indebtedness due the United States; that the discharge of an enlisted man indebted to the United States does not *ipso facto* wipe out the indebtedness, and that it would be the duty of the department to cause its collection from pay accruing to him.

(72-510, J. A. G., Apr. 29, 1916.)

GENERAL STAFF CORPS: Boards for recommending officers for detail to.

Section 5 of the national defense act approved June 3, 1916, provides, with reference to the composition of boards required by the act to recommend officers for detail to the General Staff Corps, that—

“Neither the Chief of Staff nor more than two other members of the General Staff Corps, nor any officer not a member of said corps, who shall have been stationed or employed on any duty in or near the District of Columbia within one year prior to the date of convening of any such board, shall be detailed as a member thereof.”

Held, that the service of officers on a board sitting in the District of Columbia which was found after the completion of its report to be illegal was not service in the District within the prohibition of the act, and that they were not therefore by reason of such service ineligible for service on a new board.

(6-210, J. A. G., June 30, 1916.)

GENERAL STAFF CORPS: Increases under national defense act.

With reference to section 5 of the national defense act, relating to the General Staff Corps, questions were submitted and answered as follows:

(a) Does the law with reference to the General Staff go into effect immediately upon the signing of the bill? *Answer:* The law with reference to the General Staff goes into effect immediately upon signing the bill by the President (3 Ops. Atty. Gen., 82), but, as in the case of other increases in the personnel of the Army, the additional offices representing the increase in the personnel of the General Staff Corps do not become effective at once but are added in five annual increments, the first increment being added July 1, 1916, the second July 1, 1917, etc. Unless conditions arise under which the President is authorized to organize the Army immediately, or so much thereof as he may deem necessary, the additional offices representing the increase do not come into being until the periods stated from which the respective increments are to rank—that is, from July 1 of the year in which the increment is added.

(b) What will be the authorized strength of the General Staff after the bill is signed? *Answer:* The authorized strength of the General Staff Corps, after the bill is signed, will be that provided by existing law, until July 1, 1916, when the first increment of the increase is added.

with the rank of colonel; eight inspectors general with the rank of lieutenant colonel; and sixteen inspectors general with the rank of major."

Held, that this provision does not repeal the authority contained in the act of June 23, 1874 (18 Stat., 244) to "detail officers of the line, not to exceed four, to act as assistant inspectors general" with pay and allowances as prescribed, which has been regarded by the department as permanent legislation and as not having been repealed by provisions similar to the above section 7 contained in the acts of February 5, 1885 (23 Stat., 297), March 2, 1899 (31 Stat., 701), and February 2, 1901 (31 Stat., 751).

(6-222, J. A. G., June 3, 1916.)

MEDICAL OFFICERS: Provisions of law governing examinations for promotion.

Section 24 of the national defense act, approved June 3, 1916, declares that—

"The provisions of existing law requiring examinations to determine fitness for promotion of officers of the Army are hereby extended to include promotions to all grades below that of brigadier general."

Under existing law there are two courses of action prescribed in respect to medical officers who fail to qualify for promotion for reasons other than physical disability incurred in line of duty—the act of April 23, 1908 (35 Stat., 67), which applies to captains and lieutenants, providing that upon their failure to pass the examination the finding of the examining board shall be passed upon by a board of review, and if it be concurred in by the board of review the officer shall be discharged with one year's pay; the other, the act of March 3, 1909 (35 Stat., 737), which applies in terms to majors, and provides that if such officer fails to pass an examination for promotion, for reasons other than physical disability incurred in line of duty, he shall be suspended from promotion and reexamined after the expiration of one year, and if he then fails to pass he shall be retired without promotion.

Held, that by the above-quoted provision of the national defense act the provisions of the act of March 3, 1909, *supra*, relating to examination of majors of the Medical Corps and the action to be taken in case of failure to qualify for promotion, is extended to include promotions of officers of the Medical Corps above the grade of major and below the grade of brigadier general.

(64-221.4, J. A. G., June 12, 1916.)

NATIONAL GUARD: Appointment of second lieutenants—as to antedating rank.

The question arose in connection with the proposed appointment of two enlisted men of the District of Columbia National Guard as second lieutenants whether they could properly be given rank from the date when the vacancies occurred.

Held, that the rule which applies in the case of promotions of officers by seniority, to give them the rank as from the date the vacancy occurred, does not obtain in respect of appointments of second lieu-

NATIONAL GUARD: Status of the adjutant general of a State, Territory, or District.

The question was presented whether the adjutant general of a State, Territory, or District is an officer of the National Guard within the meaning of the national defense act, approved June 3, 1916, which provides, in section 109, for pay of certain commissioned officers of the National Guard, including *all staff officers*, and in section 110, that the participation in Federal appropriations after a certain time shall be dependent upon the enactment of local law providing that—

“Staff officers, including officers of the Pay, Inspection, Subsistence, and Medical Departments, hereafter appointed shall have had previous military experience,” etc.

And further in section 66 that—

“The adjutants general of the States, Territories, and the District of Columbia *and the officers of the National Guard* shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe * * *.”

Held, that in providing for the organization of the National Guard as a Federal force Congress has recognized the duties of the several States, and has required or relied upon their cooperation; that the adjutant general is an official whom the act contemplates the State will provide and maintain in the performance of its duties; and that it recognizes the adjutant general of a State as a State official only and not as an officer of the National Guard.

(58-210, J. A. G., June 9, 1916.)

OFFICERS: Recommissioning of persons formerly in the service.

Section 24 of the national-defense act contains the following provision:

“The President may recommission persons who have heretofore held commissions in the Regular Army and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness; such recommissioned officers shall take rank at the foot of the respective grades which they held at the time of their separation from the Army.”

Held, that this provision creates no new office, and that a former officer can only be recommissioned thereunder to fill an existing vacancy. (64-213.2, J. A. G., June 20, 1916.) *Held, further*, that this provision relates exclusively to persons who are not a part of the Army and does not apply to officers on the retired list. (88-110, J. A. G., May 27, 1916.) Also held, that one who prior to the passage of the national defense act had honorably resigned from the Medical Corps while a captain may, though he be over 30 years of age, be recommissioned (that is, reappointed) in said corps under the above provisions of section 24 of that act, without regard to the requirement of section 10 thereof that persons hereafter commissioned in the Medical Corps shall be between the ages of 22 and 30 years; the latter provision, in respect of age at least, being applicable to original appointments as first lieutenants in said corps.

(64-213.2, J. A. G., June 12, 1916.)

ances prescribed therein as of that date. They do not, however, become commissioned officers of the Quartermaster Corps until acceptance of their commissions after confirmation by the Senate.

(b) When their status as to rank, pay, and allowances changes, does such change also involve necessarily assignment to different duties from those heretofore performed by them? *Answer:* No. The legislation does not contemplate any necessary assignment to different duties from those heretofore performed by these pay clerks, but after becoming commissioned officers they may be charged with additional duties and responsibilities involved in such change in their status.

(6-224, J. A. G., June 13, 1916.)

POST EXCHANGE: Loss of funds through negligence of post exchange officers.

The field safe at a post exchange was robbed at night, resulting in the loss of \$127.64 in cash belonging to the exchange. The post exchange officer did not take personal charge of the cash accruing from the preceding day's business, but left it with the exchange steward, who locked it in the field safe "according to custom," to be turned over to the post exchange officer the next morning.

The post exchange regulations (Par. 3, G. O. No. 176, War Dept., 1909) provide that:

"The exchange officer is in charge of the exchange and is responsible for its management. * * * As custodian of funds belonging to enlisted men he should attend to all cash transactions in person"—and this regulation has been viewed by the War Department as requiring that the post exchange officer "*should at the close of each day's business check up the steward's daily report of cash and coupons received, and after verification enter these data in the cash book, as well as all other transactions involving cash receipts and expenditures, and deposit the cash on hand in his safe.*" (Par. 1075, "A Guide for Inspectors General, 1911.")

Held, that by reason of his failure to take personal charge of the funds at the end of the day's business and properly secure them, the post exchange officer became responsible for the loss.

(72-517, J. A. G., May 25, 1916.)

PRIVATE PROPERTY: Disposition of ammunition taken from private citizens under martial law.

In connection with the Colorado strike troubles in 1914 Federal troops, under martial law, collected a lot of miscellaneous ammunition from citizens. In view of the practical difficulty of assorting and returning such ammunition to the owners after the cessation of the disturbances it was proposed to sell all of it, including that for which claim had been made, and to deposit the proceeds in the Treasury of the United States.

Held, that the owners of the ammunition were entitled to its return to them and that it could not be sold or otherwise disposed of except in accordance with the directions of the owners; provided, however, that as to such portion thereof for which no claim may be made

nels; ten majors; thirty captains; seventy-five first lieutenants; and the aviation section, which shall consist of one colonel; one lieutenant colonel; eight majors; twenty-four captains; *and one hundred and fourteen first lieutenants, who* shall be selected from among officers of the Army at large of corresponding grades or from among officers of the grade below, exclusive of those serving by detail in staff corps or departments, *who are qualified as military aviators*, and shall be detailed to serve as aviation officers for periods of four years unless sooner relieved; and the provisions of section twenty-seven of the act of Congress approved February second, nineteen hundred and one, are hereby extended to apply to said aviation officers and to vacancies created in any arm, corps, or department of the Army by the detail of said officers therefrom; but nothing in said act or in any other law now in force shall be held to prevent the detail or redetail at any time, to fill a vacancy among the aviation officers authorized by this act, of any officer who, during prior service as an aviation officer of the aviation section, shall have become proficient in military aviation."

With reference to the above provision, questions were submitted and answered as follows:

(a) To what does the word "who" following the words "one hundred and fourteen first lieutenants" relate—to the Signal Corps and aviation section combined, or only to the latter? *Answer:* It refers only to the aviation section.

(b) To what class of officers does the phrase "who are qualified as military aviators" relate? *Answer:* Only to the officers selected from "the grade below."

(c) Can officers serving by detail in staff corps or departments who are not qualified as military aviators be detailed in the aviation section? *Answer:* Officers serving by detail in the staff corps or departments who are not qualified as military aviators may be detailed in the aviation section, provided it be *in the corresponding grade*, but they may not be detailed to the grade above.

(6-228, J. A. G., May 27, 1916.)

TAXATION: Chauffeur's license for Government employees.

A chauffeur in the employ of the Federal Government in the Philippine Islands operating an automobile owned by the Government and used exclusively in the performance of the business of the Federal Government was called upon by the territorial authorities to pay a chauffeur's license tax.

Held, that the demand was illegal, as it is definitely settled that the instrumentalities of the Federal Government are not subject to taxation or the police regulations of local governments.

(90-125, J. A. G., June 20, 1916.)

TRANSPORTATION: Allowance to general prisoner on discharge.

In the case of a general prisoner at the United States Disciplinary Barracks under sentence of dishonorable discharge, the question arose as to whether he was entitled to be furnished transportation

1915 (38 Stat., 1077), for damages to personal baggage in transit. The comptroller affirmed the auditor's disallowance on the ground of lack of sufficient evidence.

Held, that the evidence submitted to the accounting officers of the Treasury in support of a claim for reimbursement under the act of March 3, 1885, as extended, for personal baggage of an officer or enlisted man of the Army lost or damaged in changing station should consist of as complete a statement of facts as possible relative to the value of the property and the circumstances attending its loss or damage, and not merely of the conclusions of a board of officers as to such loss or damage, which conclusions are in no way binding on the accounting officers; that in the consideration of claims of this class the opinions or conclusions of the board are entitled to some weight, but the accounting officers of the Treasury are not by such opinions and conclusions relieved of the duty of reaching their own conclusions or in any manner bound by such opinions or conclusions, and that if possible a clear and minutely detailed description of the damage to each article for which compensation is claimed, as well as the market value of the article at time of crating or packing for shipment, and all facts obtainable as to when, where, and under what circumstances the damage sustained should be given.

(Comp. W. W. Warwick, May 16, 1916.)

ENLISTED MEN: Pay of privates, Medical Department, under the new national defense act.

By section 10 of the national defense act it is provided that—

“The enlisted men of the Hospital Corps who are in active service at the time of the approval of this act are hereby transferred to the corresponding grades of the Medical Department established by this act.

Section 28 provides:

“Hereafter the monthly pay of enlisted men of certain grades of the Army created in this act shall be as follows, namely: * * * private, Medical Department, * * * fifteen dollars. Nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted men of the Army.”

Held, that by reason of the saving clause in section 28, that “nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted men of the Army,” privates of the Medical Department transferred to that grade from the Medical Corps by operation of section 10 are entitled to be paid at the rate of \$16 per month during the remainder of their current enlistment.

Held further, that the pay of men enlisting in the grade of private, Medical Department, on or after June 3, 1916, will be at the rate of \$15 per month, and also that privates of other branches of the military service whose pay is \$15 per month who are transferred to the grade of private, Medical Department, upon their own application or with their consent, will be paid upon the basis of the new rate of \$15 per month.

(Acting Comp. C. M. Foree, June 19, 1916.)

engaged in field or coast-defense training ordered or authorized under the provisions of this act."

With reference to this provision, the following questions were submitted:

(1) "Can employees of the department who are members of the National Guard and have been called out by order of the President, be paid their salaries as employees of the department for such time as they remain in camp and are not drafted into the active military service of the Government?"

(2) "Can any such employees be borne on the rolls of the department in a pay status after they have been drafted into active military service of the Government?"

(3) "Can employees, where they are paid from lump fund appropriations, be carried on the rolls of the Treasury Department in a non-pay status after they have been drafted into the active military service of the Government?"

(4) "Does the provision of this section take effect on date of its approval or on July 1, 1916?"

Held, in answer to questions (1) and (2), that the leave authorized in favor of officers and employees who are members of the National Guard being only for the time while they are "engaged in field or coast-defense training" ordered or authorized under the provisions of that act, it is not available to such officers and employees when called into the service of the United States by the President. Advised, however, that while the employees referred to are not entitled to military leave under the said provision, there appears to be no reason why they should not be paid their regular salaries as officers or employees for such period prior to their actual muster into the service as would be covered by annual leave granted to them in accordance with law, and that even if actually mustered into the service of the United States, *enlisted men* may continue to receive pay as officers or employees until the expiration of the leave granted, provided the combined pay of the military and civil positions does not exceed \$2,000 per annum. If it does exceed \$2,000, payment of any compensation as a civilian officer or employee would be prohibited under the provisions of section 6 of the act of May 10, 1916 (Pub. No. 73). This applies to men called forth under the provisions of section 4 of the act of January 21, 1903, as amended, as well as those drafted into the military service under the provisions of section 111 of the act of June 3, 1916.

Held, that question (3) being purely administrative and not involving any payment to be made, the comptroller was without jurisdiction to decide it.

Held, as to question (4), that the section referred to became effective June 3, 1916, the date of approval.

(Comp. W. W. Warwick, June 28, 1916.)

PAY AND ALLOWANCES: Foreign service pay for trips into Mexico.

In the case of certain officers and enlisted men connected with the punitive expedition into Mexico who had temporary station at Columbus, N. Mex., and made trips into Mexico, *held*, that they were entitled to foreign service pay for the time served in Mexico on the trips.

(Comp. W. W. Warwick, June 26, 1916.)

"On and after July first, nineteen hundred and sixteen, an enlisted man when discharged from the service, except by way of punishment for an offense, shall receive $3\frac{1}{2}$ cents per mile from the place of his discharge to the place of his acceptance for enlistment, enrollment, or original muster into the service, at his option: *Provided*, That for sea travel on discharge transportation and subsistence only shall be furnished to enlisted men."

By section 128 it is provided "that all laws or parts of laws in so far as they are inconsistent with this act are hereby repealed."

In view of these provisions of the national defense act the following questions were submitted for decision:

(a) Will the travel pay of enlisted men on discharge on and after July 1, 1916, be governed by the acts of June 12, 1906, and June 3, 1916?

(b) Does the act of June 3, 1916, confer upon an enlisted man on discharge a right to travel pay to a place other than the place of his acceptance for enlistment?

Held, that the act of August 24, 1912 (37 Stat., 575), providing for transportation and subsistence in kind for enlisted men on their discharge, or, in lieu thereof, 2 cents a mile, at the election of the soldier, was repealed by the act of June 3, 1916, and that on and after July 1, 1916, the payment of travel pay to enlisted men of the Army on discharge will be governed by the acts of June 12, 1906 (34 Stat., 247), and June 3, 1916. The act of June 12, 1906, referred to provides:

"For the purpose of determining allowances for all travel under orders, or for officers and enlisted men on discharge, travel in the Philippine Archipelago, the Hawaiian Archipelago, the home waters of the United States, and between the United States and Alaska shall not be regarded as sea travel and shall be paid for at rates established by law for land travel within the boundaries of the United States."

Question (a) accordingly answered in the affirmative.

Held, as to question (b) that the language "at his option" in section 126 of the national defense act has operation only with reference to the preceding words "enrollment" or "original muster into the service"; that as these terms are not properly applicable to enlisted men of the Regular Army, such enlisted men on discharge are entitled to travel allowances only to the place of their acceptance for enlistment, i. e., the place of initial acceptance, it being the purpose of the act to return a man to the place from which he was taken by the Government. As to enlisted men of volunteer or militia organizations to which the terms "enrollment" or "muster into the service" may apply, they may exercise an option. If a man enters the military service as a part of a recognized organization which has been enrolled for the purpose of becoming a part of the Army, and such organization is mustered into the service at a different place from that where the members were enrolled, he may, upon discharge or muster out, be allowed travel to the place of his enrollment or to the place of his muster in, as he may elect, or, in the language of the statute "at his option." Answering question (b) specifically, an enlisted man of the Regular Army is entitled to travel pay only to the place of his acceptance for enlistment.

(Comp. W. W. Warwick, June 26, 1916.)

the Organized Militia who have qualified under the national defense act of June 3, 1916, by subscribing the oath and enlistment contract as provided in sections 70 and 73 of that act.

3. The Organized Militia of the States of Arizona, New Mexico, and Texas have been mustered into the service under the call of May 9, 1916, and the Organized Militia and National Guard of the other States are in the service under the call issued by the President June 18, 1916, both calls being for the purpose of protecting the United States against aggression from Mexico.

4. The questions submitted will be answered first with respect to the Organized Militia of the States of Arizona, New Mexico, and Texas. These were mustered into the service of the United States under section 7 of the Dick bill, the officers and enlisted men taking in connection with the said muster the oath prescribed by the muster-in regulations promulgated under that law. Their status is that of militia called into the service of the United States for one of the purposes specified in the Constitution, that is, to protect the United States against invasion. While in such service, they are subject to the laws and regulations governing the Regular Army, so far as applicable to their temporary status, and are subject only to the orders of the President. They are not, while in such service, under the jurisdiction of the States, nor are they subject to the orders of the governors, whose authority over them for the time being is suspended, except only with respect to the appointment of officers. They are not a part of the Regular Army of the United States, nor are they subject to the Regular Army term of service. They are in the service *as militia* called forth to meet the exigency for which the call was issued. While in the service they are, of course, in the pay of the United States Government and are entitled to the same pay and allowances as the regular troops. With regard to their pensionable status, section 22 of the Dick bill gives them the benefit of the pension laws for any disability incurred in the service and, in case of death, confers on the widow or children of the deceased all the benefits of such pension laws. Under the decision of the comptroller of July 20, 1916, the widow or beneficiary of a member of the Organized Militia dying in the service, in line of duty and not as the result of his own misconduct, is entitled to the six months' gratuity pay, the same as in the case of officers or soldiers of the Regular Army.

5. Answering the questions submitted with respect to the Organized Militia and National Guard who are in the service under the call of June 18, 1916, it should be observed that shortly after the passage of the national defense act of June 3, 1916, the Organized Militia of the several States began to transform themselves into the National Guard of the new national defense act. The call of June 18, 1916, found this process of transformation going on, and it was necessary, therefore, for that call to embrace both the Organized Militia and the National Guard, if it were to be effective to call into the service of the United States all of the militia forces, and it was so drafted.

6. With respect to those organizations of the Organized Militia that had transformed themselves, prior to June 18, 1916, into the National Guard under said act, no muster in was necessary, as it was the effect of the call to place them in the service of the United States from the date they were required by the terms of the call to

the National Guard available for any service for which the Regular Army may be used during the period of service under the call. But that Congress did not so intend is evident from the fact that the act of June 3, 1916, contains a provision (sec. 101) applicable to the National Guard "when called *as such* into the service of the United States" and a distinct provision (sec. 111) for drafting them into the Federal service, applicable only "when Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army." As to persons so drafted, it is distinctly provided that they "shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army * * * ." It is clear, I think, that the national defense act contemplates that the National Guard shall be available for service, either as National Guard called into the service of the United States *as such* for the three constitutional purposes or, when specially authorized by Congress, as a *national force* supplementing the Regular Army and available for any service for which regular troops may be used. In other words, the national defense act gives the Government the right, in return for the expenditure for pay, training, and equipment of the National Guard, to draft them into the Federal service to supplement the Regular Army, but this right can be exercised only when Congress shall have authorized its exercise, as has been done in the joint resolution of July 1, 1916.

9. With regard to the effect of the declaration in the joint resolution of July 1, 1916, that an emergency exists, I think there can be no question but that this declaration serves as the reason for conferring the authority to make the draft and also as a limitation upon the authority with regard to the term of service under the draft. It is provided therein that the draft shall be "*for the period of the emergency*, not exceeding three years, unless sooner discharged." The resolution confers a discretion on the President to issue the draft or not, as the exigencies of the situation may require.

E. H. CROWDER,
Judge Advocate General.

AVIATION SERVICE: Increase in personnel.

Anticipating a possible shortage of flyers to meet the emergency on the Mexican border, the Chief Signal Officer submitted the following questions, to which are subjoined the answers given:

(a) May qualified fliers from the militia or from civil life be appointed and commissioned reserve officers and assigned as reserve officers to the aviation section of the Signal Corps? *Answer:* Section 37 of the national defense act authorizes the creation of an Officers' Reserve Corps to include, *inter alia*, "sections corresponding to the various arms, staff corps, and departments of the Regular Army." Qualified fliers from the militia or from civil life may be appointed and commissioned as reserve officers in the Officers' Reserve Corps, and in time of "actual or threatened hostilities" they may be assigned to duty with the aviation section of the Signal Corps, as authorized by section 38 of that act.

ENLISTED MEN: Continuous-service pay.

An enlisted man of the Regular Army whose discharge was authorized to enable him to accept a commission in the National Guard, in the service of the United States, inquired whether he would lose his continuous-service pay status by accepting such commission. The act of May 11, 1908 (35 Stat., 105), provides for continuous-service pay to those reenlisting within three months after their honorable discharge.

Held, that there exists no exception to the requirement that reenlistment must occur within three months from the soldier's discharge to entitle him to continuous-service pay.

(34-225, J. A. G., July 3, 1916.)

ENLISTED MEN: Detail of noncommissioned officers for service in National Guard.

Section 36 of the national defense act authorizes the Secretary of War to detail "sergeants" for the purpose of "assisting in the instruction of the personnel and care of property in the hands of the National Guard."

Held, that the purpose of the act being to provide for the detail of competent men for the purposes mentioned, the word "sergeants" should be construed in its broader sense so as to include the detail of sergeants, first class, in the few cases where, on account of the technical knowledge required, the instruction of the Signal Corps of the National Guard can be properly given only by such sergeants.

(6-156, J. A. G., July 18, 1916.)

ENLISTED MEN: Discharge because of dependent family.

Section 29 of the national defense act contains the following provision:

"That when by reason of death or disability of a member of the family of an enlisted man occurring after his enlistment members of his family become dependent upon him for support, he may, in the discretion of the Secretary of War, be discharged from the service of the United States or be furloughed to the Regular Army Reserve upon due proof being made of such condition."

Held, that this provision repeals section 30 of the act of February 2, 1901 (31 Stat., 756), which authorized the discharge only upon the death of a dependent parent and after one year's service.

(6-310, J. A. G., July 28, 1916.)

ENLISTED MEN: Rates of pay.

Section 19 of the national defense act of June 3, 1916, in the part prescribing the composition of a gun or howitzer battery of Field Artillery, contains the following provision:

"When no enlisted men of the Quartermaster Corps are attached for such positions there shall be added to each battery of mountain

NATIONAL GUARD: Discharge of members by State authorities after the President's call.

After the receipt of the President's order of June 18, 1916, calling the Organized Militia into the service of the United States, discharges were issued to certain enlisted men by order of the governor of a State upon personal pleas by relatives and friends of the enlisted men. Other discharges were issued by organization commanders to men who were considered undesirable or physically unfit for the service.

Held, that after the receipt by a governor of the President's call he was unauthorized to order the discharge of enlisted men, and that the Federal authority alone can relieve the men from their obligation.

(58-052, J. A. G., July 17, 1916.)

NATIONAL GUARD: Discharge of officers and enlisted men for physical disability.

Section 115 of the national defense act provides that:

"Every officer and enlisted man of the National Guard who shall be called into the service of the United States as such shall be examined as to his physical fitness under such regulations as the President may prescribe without further commission or enlistment."

In connection with the induction of the National Guard into the service of the United States under the President's call of June 18, 1916, the question arose whether those officers and enlisted men found physically unfit for service should be discharged from both the Federal service and the National Guard.

Held as follows: Under the national defense act the National Guard occupies a dual status, i. e., as a national force and also as a State force, and no officer or enlisted man can remain a member unless he is physically qualified for Federal service. Congress has prescribed the qualifications for commission or enlistment in the National Guard and has asserted, on behalf of the United States, the authority to prescribe the conditions under which enlistments and discharges in and from the National Guard shall be made. Section 72 of the national defense act restricts discharges in time of peace, so that no discharge may be given in time of peace "prior to the expiration of terms of enlistment" except "under such regulations as the President may prescribe." Section 115 provides for a medical examination to determine the physical condition of the officers and enlisted men when called into the service of the United States, and it appears clear that an officer or enlisted man, upon being examined as required in that section and found physically defective, must be discharged not only from the operation of the call into the Federal service, but also from the National Guard. In the case of an enlisted man the discharge, when ordered, should be effected by a discharge in writing, signed by the proper National Guard commander, under the provisions of section 72 of the national defense act, and should be so worded as to show that it is a discharge not only from the operation of the Federal call, but also from the National Guard. With respect to a commissioned officer, a discharge should be ordered by the President and should purport to be a discharge from the National Guard.

(28-210, J. A. G., July 18, 1916.)

Answer: The two statutes constitute separate authorities for leaves of absence with pay. The leaves authorized by section 80 of the national defense act are additional to those authorized by the act of February 1, 1901.

(*d*) Do the provisions apply to the absence of a Federal employee by direction of the governor of a State for the purpose of complying with the following provisions of section 92 of the national defense act, "and shall, in addition thereto, participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year"? *Answer:* Yes. The training is to be carried out by the several States. See section 91.

(*e*) Do the exemptions of section 59 from militia duty prohibit the exempted persons from performing militia duty? *Answer:* That such exemption may be waived by the individual is evident from section 80 providing for leaves of absence of all officers of the United States who shall be members of the National Guard.

(*f*) If optional, are those exempted by section 59 entitled to the benefits of section 80 of the national defense act providing for leaves of absence? *Answer:* Yes. The fact that the service is optional does not deprive the person of leaves of absence authorized by section 80.

(*g*) Do the terms "artificers and workmen" as employed in section 59 comprise "all employees at arsenals," or are there excepted classes such as those performing clerical, designing, or supervising duties? *Answer:* The word "workmen" is one of broad meaning. Whether it includes those performing clerical, designing, or supervising duties, I deem it unnecessary to determine. I am informed that all persons performing clerical, designing, or supervising duties in arsenals are in the civil service of the United States. They are, therefore, executive officers of the United States and are exempted under section 59 whether they be included in the term "workmen" or not. Section 59 by exempting executive officers of the Government of the United States and artificers and workmen in the armories and arsenals includes within its provisions, I think, all persons employed at such armories or arsenals.

(16-407, J. A. G., July 14, 1916.)

NATIONAL GUARD: Minors under 18 not eligible for enlistment.

The question was presented whether a minor under 18 years of age may, with the consent of his parents or guardian, legally be enlisted in the National Guard. Section 58 of the national defense act provides:

"The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years."

Held, that this provision is controlling and limits the ages for qualification as therein specified, and that the provisions in section 27 relating to the ages for enlistment or muster in have no application to the National Guard.

(34-110, J. A. G., July 7, 1916.)

OFFICERS: Appointment of persons not citizens of the United States.

The pending Army appropriation bill contains the provision that—

“No part of the appropriation made in this act shall be available for the salary or pay of any person hereafter, in time of peace, appointed an officer in the Army, who is not a citizen of the United States.”

Held, that this does not repeal the provisions of existing law authorizing the appointment of native Filipinos as officers of Philippine Scouts, and of native citizens of Porto Rico as officers in the Porto Rico regiment.

(6-260, J. A. G., July 3, 1916.)

OFFICERS: Promotions in Quartermaster Corps.

The new national-defense act provides for certain increases of officers in the Quartermaster Corps but prescribes no rule for filling the vacancies.

Held, that the new positions created belong to the Quartermaster Corps as a whole, and the rule prescribed by the act of August 3, 1912 (37 Stat., 591), in connection with the reorganization of that corps, is not applicable, and that the vacancies are required to be filled according to the general rule of seniority prescribed in section 1 of the act of October 1, 1890 (26 Stat., 563).

(6-224, J. A. G., July 3, 1916.)

OFFICERS: Scope of examination for appointment.

Section 16 of the national-defense act approved June 3, 1916, relating to the appointment of veterinarians, contains the proviso—

“That no such appointment of any veterinarian shall be made unless he shall first pass satisfactorily a practical professional examination as to his fitness for the military service.”

Held, that as the act limits the character of the examination to a practical professional and physical examination, it excludes a theoretical examination, and the examination required must be confined to such inquiry as will determine the ability of the applicant skillfully to perform his profession, but may include a written examination on questions of a practical nature.

(64-221.4, J. A. G., July 1, 1916.)

OFFICERS' RESERVE CORPS: Number of officers authorized in various grades.

Section 37 of the national defense act contains the following provision:

“*Provided*, That the proportion of officers in any section of the Officers' Reserve Corps shall not exceed the proportion for the same grade in the corresponding arm, corps, or department of the Regular Army, except that the number commissioned in the lowest authorized grade in any section of the Officers' Reserve Corps shall not be limited.”

such duty he shall receive the full pay of his grade, service under such detail must be regarded as service "on active duty" within the meaning of section 24 of the national defense act, above quoted.

(b) "What of retired officers detailed under the act of 1904?"

Answer: With respect to a retired officer detailed to an educational institution under the act of April 21, 1904 (32 Stat. 255), I think the question should be answered in the negative. That statute authorized the detail to the particular duty under conditions that the detail should be made with the officer's consent, and that the officer so detailed should receive no compensation from the Government other than his retired pay—it being contemplated that the institution should supplement his pay and provide allowances by way of additional compensation. I think it is clear that an officer detailed under this act was not regarded as detailed on active duty, and is not to be regarded as having been "on active duty within the meaning of section 24, last sentence," of the national defense act.

(c) "Will an officer detailed under section 45 of the same act be considered as on active duty under section 24?" *Answer:* This question is already answered under (a).

(d) "Will a retired officer detailed under section 56 of the same act be considered as on active duty under section 24? Will he be entitled to full pay and allowances?" *Answer:* Section 56 does not expressly authorize the detail of retired officers or noncommissioned officers to the schools and colleges specified therein, but confers authority for the detail of "such commissioned and noncommissioned officers of the Army to said schools and colleges." I think that this section only confers authority for the detail of officers and noncommissioned officers on the active list, and that the authority for the detail of retired officers and noncommissioned officers to such schools and colleges must be found in other statutes.

(88-620, J. A. G., July 25, 1916.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

ARMY RESERVE: Continuous-service pay.

The following questions were submitted for decision:

"(a) Whether an enlisted man who has been transferred to the Army reserve may be discharged from the reserve and reenlisted before the expiration of his existing seven-year term upon being called to the colors in time of war."

"(b) Whether time spent in the Army reserve, not with the colors, is to be counted in computing continuous-service pay."

Held, that both the acts of August 24, 1912 (37 Stat., 590), and June 3, 1916 (Public No. 85, 64th Cong.), provide that an enlisted man furloughed to the Army reserve is not entitled to be discharged and reenlisted until the expiration of his seven-year term of enlistment. Question (a) answered in the negative.

Held, as to question (b), that the acts of August 24, 1912, and June 3, 1916, contemplate four and three years, respectively, of active

ENLISTED MEN: Reduction of grades under the national defense act.

With reference to decreases in the number of enlisted men of different grades provided by the national defense act and of the applicability thereto of the provision in section 28 of that act that "nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted man of the Army—

Held, that this provision relates to the pay of *grades* and not of individuals, and that demotion of individual soldiers, if found necessary to be made in order to comply with the law providing for a reduction in the members of grades in any particular line of the Army, is not a reduction of pay or allowances fixed by law for such grades, and hence would not be prohibited by this provision.

(Comp. Treas., July 19, 1916.)

MEDICAL CORPS: Computing length of service of dental surgeons.

A decision was requested whether in computing, under the provisions of section 10 of the national defense act, the length of service of dental surgeons, for promotion and other purposes, all such dental surgeons as had service as contract or acting dental surgeons prior to June 3, 1916, if otherwise eligible, should be given credit for the length of their service as such contract or acting dental surgeons, in addition to credit for service as first lieutenants, under the act of March 3, 1911 (36 Stat., 1054). Section 10 of the national defense act, authorizing the appointment of dental surgeons as commissioned officers, provides, *inter alia*:

"Dental surgeons shall have the rank, pay, and allowances of first lieutenants until they have completed eight years' service. Dental surgeons of more than eight but less than twenty-four years' service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of captains. Dental surgeons of more than twenty-four years' service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of major."

The act of March 3, 1911, contains the provision that—

"Acting dental surgeons who have served three years in a manner satisfactory to the Secretary of War shall be eligible for appointment as dental surgeons, and after passing in a satisfactory manner an examination which may be prescribed by the Secretary of War may be commissioned with the rank of first lieutenant in the Dental Corps to fill the vacancies existing therein;" and also contains a provision—

"That the time served by dental surgeons as acting dental or contract dental surgeons shall be reckoned in computing the increased service pay of such as are commissioned under this act."

Held, that the provision quoted from the act of 1911 was not repealed by the national defense act, and that the two provisions should be read together; that the term "years' service" as used in the act of June 3, 1916, includes service under contract as well as service under commission, and is limited to service as a *dental surgeon* under contract or commission; and that therefore, in computing under said law the length of service of dental surgeons, for promotion and

ployed they shall receive the full pay and allowances of their grade: *And provided further*, That hereafter any retired officer who has been or shall be detailed on active duty shall receive the rank, pay, and allowances of the grade, not above that of major, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement."

The act of March 2, 1903 (32 Stat., 932), provides:

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

Held, that the act of June 3, 1916, does not expressly, or by necessary implication, repeal or modify any part of the act of March 2, 1903, and that as the latter act expressly provides that time after retirement shall not be counted for longevity purposes, officers coming within the provision in question of the act of June 3, 1916, are not entitled to any higher pay in the grade that they would have attained in due course of promotion if they had remained on the active list than the pay of such higher grade computed on the length of their service at the time of their retirement.

(Comp. Treas., July 28, 1916.)

COURT DECISION.

(Digest prepared in the office of the Judge Advocate General.)

NATURALIZATION: Alien enlisted men furloughed to Army Reserve.

Section 2166, Revised Statutes, provides that any alien of the age of 21 years and upward, who has enlisted or may enlist in the armies of the United States and has been honorably discharged, shall be admitted to become a citizen upon his petition without any previous declaration of intention. The fourth article of war declares that no discharge shall be given to any enlisted man before his term of service is expired except by order of the President, Secretary of War, the commanding general of a department, or by sentence of court-martial. An enlisted man (alien) who, after three years' active service, had been furloughed to the Army Reserve, filed an application for naturalization under section 2166, Revised Statutes.

Held, that his certificate of furlough was not an honorable discharge entitling him to apply for citizenship under section 2166, Revised Statutes.

(In re *Markun*, 232 Fed., 1018.)

ments of any arm, corps, or department in such manner as he may prescribe," and, in the event of actual or threatened hostilities, to "mobilize the Regular Army Reserve in such manner as he may determine, and thereafter retain it, or any part thereof, in active service for such period as he may determine the conditions demand."

Held, that the law contemplates that the President may cause reservists to be organized at all times in the manner indicated and that, in the discretion of the President, they may be attached, as such, to organizations of the Regular Army that are at maximum strength, but when so attached they are not constituent parts of such organizations, and form no part of the numbers authorized by law for such organizations.

(6-300, J. A. G., Aug. 23, 1916.)

ARMY RESERVE: Physical disability of members called to the colors.

In the case of a member of the Regular Army Reserve called to the colors it was found that he was afflicted with a venereal disease contracted after he was furloughed to the reserve. He having been accepted as "physically fit for service" upon reporting for duty, except for this disability requiring only temporary hospital treatment, the question was presented whether his absence from duty while in the hospital on this account came within the purview of the act of August 24, 1912 (37 Stat., 572), providing for deduction from the pay of an officer or enlisted man for time absent from duty on account of disease resulting from his own misconduct, etc. (G. O. 31, W. D., 1912).

Held, that when the reservist was accepted upon reporting for duty he was in active service, and thereupon became subject to the statute referred to; that the disease he had is regarded as a disease proscribed by that act, and that as it was incurred during his current enlistment, which was entered into subsequent to the passage of that act, he was not entitled to pay for the time he was absent from duty on account of such disease.

(6-300, J. A. G., Aug. 29, 1916.)

CONTRACTS: Questions arising out of the default of contractor; appropriations.

A contractor for furnishing Quartermaster supplies defaulted and, in accordance with the provisions of the contract, the Government purchased the required supplies in the open market at an excess cost of \$800.36. The amount retained from payment to the contractor was only \$64, and the surety bond was in the penal sum of \$500.

Held, that demand could be made upon the surety for only \$500, which, when collected, should be deposited to the credit of the appropriation for the supplies, and not deposited as miscellaneous receipts (18 Comp. Dec., 430), and that the \$64 should remain in the appropriation for the supplies. *Advised* that if the surety refused to pay the amount of the penalty on demand the facts should be reported to the Attorney General with a view to the enforcement of the demand by judicial proceedings.

(76-742, J. A. G., Aug. 11, 1916.)

BULLETIN 39.

BULLETIN }
No. 39. }

WAR DEPARTMENT,
WASHINGTON, *October 6, 1916.*

The following digest of opinions of the Judge Advocate General of the Army for the month of September, 1916, and of certain decisions of the Comptroller of the Treasury and of a court, is published for the information of the service in general.

[2471382, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

TASKER H. BLISS,
Major General, Acting Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY RESERVE: Promotion of members in active service.

With reference to members of the Regular Army Reserve called to the colors and assigned to particular organizations of the Regular Army (sec. 31, national defense act),

Held, that when so assigned, reservists are eligible for promotion as other members of the organizations who are serving in the active period of their enlistment.

(6-151.1, J. A. G., Sept. 27, 1916.)

DETACHED SERVICE: Service in command of a headquarters company.

The national defense act of June 3, 1916, provides for certain headquarters organizations designated as headquarters company for the Infantry and Artillery, and headquarters troop for the Cavalry. (Secs. 17, 18, and 19.)

Held, that service of a commissioned officer in command of such a headquarters company or troop constitutes service "with a troop, battery, or company," within the purview of the detached-service act of 1912.

(6-124.23, J. A. G., Sept. 25, 1916.)

ENLISTED MEN: Commissioned service counted for purposes of retirement.

Section 1 of the act of March 2, 1907 (34 Stat., 1217), provides:

"When an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, * * *

private apartment." Applying this statute in a similar case, the Comptroller of the Treasury said:

"Where an officer or employee of the Government has a regular office elsewhere than in his private residence, the maintenance in such residence, at public expense, of a telephone connected with his regular office is prohibited by the act of August 23, 1912, although the part of his residence in which the telephone is installed is set apart and designated also as an office." (22 Comp. Dec., 502.)

Held, that the installation of the telephone service requested at public expense was prohibited by the statute.

(Comp. Treas., Aug. 15, 1916.)

VEHICLES: Purchase of motorcycles.

Section 5 of the act of July 16, 1914 (38 Stat., 508), forbids the use of any appropriation made by Congress for the "purchase, maintenance, repair, or operation of motor-propelled or horse-drawn passenger-carrying vehicles for any branch of the public service of the United States unless the same is specifically authorized by law."

Held, that ordinary motorcycles are passenger-carrying vehicles within the prohibition of the act.

(Comp. Treas., Sept. 8, 1916.)

COURT DECISION.

(Digest prepared in the office of the Judge Advocate General.)

HABEAS CORPUS: Authority of State officers to arrest and detain soldiers for alleged misconduct while in the performance of military duty.

Two members of a company of the Ohio National Guard (a captain and a sergeant) while in the service of the United States and shortly after the President's call of June 18, 1916, were arrested by the municipal authorities of the city of Hamilton, Ohio, each on a charge of a breach of the peace. The accused each filed a petition for habeas corpus in the District Court of the United States, Southern District of Ohio. At the habeas corpus hearing the evidence was to the effect that the company to which the accused belonged was marching to the courthouse square in the city of Hamilton for the purpose of participating in a meeting to encourage the enlistment of recruits, and that some of the persons assembled along the way pressed forward so as to obstruct the marching of the company and were pushed back in order that the company might pass. The complaint against the officer and sergeant grew out of their action in thus clearing the way for their company. After their arrest by the civil authorities, charges were preferred against the officer and sergeant by the military authorities and the court-martial proceedings were pending at the time of the habeas corpus hearing.

The petitioners were discharged from the custody of the State authorities under the following rulings deduced from previous cases:

(a) An officer who, in the performance of what he conceives to be his official duties, transcends his authority and invades private rights,

BULLETIN 47.

BULLETIN }
No. 47. }

WAR DEPARTMENT,
WASHINGTON, *November 16, 1916.*

The following digest of opinions of the Judge Advocate General of the Army for the month of October, 1916, and of certain decisions of the Comptroller of the Treasury, is published for the information of the service in general.

[2489781, A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

ARMY RESERVE: Continuation of gunner's pay on being called to the colors.

The question was presented whether a man furloughed to the reserve and returned to the colors with his battery is entitled to be carried as gunner, his qualification as such not having expired by limitation under A. R. 1344, which provides for the payment to a soldier of gunner's pay for one year after qualification, provided that "he continues to be a member of the Field Artillery or reenlists in that branch of the service within three months from date of discharge therefrom."

Held, that under the circumstances stated the soldier "continues to be a member of the Field Artillery," under a fair construction of the regulation, and is therefore entitled to gunner's pay.

(13-111.2, J. A. G., Oct. 21, 1916.)

ARMY RESERVE: Pay and allowances upon responding to mobilization order and being excused.

In the case of certain members of the Regular Army Reserve who reported in compliance with the mobilization order of June 28, 1916, and who were thereafter excused from mobilization, because of dependent families, under War Department instructions dated July 26, 1916, the question was presented as to their right to pay and allowances and mobilization pay. Under section 32 of the National De-

TRANSPORTATION: Charge for special services rendered by transportation company.

. In connection with the transportation by the Government of horses from Washington, D. C., to St. Louis, Mo., the railroad company put in a bill for \$3 for feed, unloading, loading, and switching at St. Louis, submitting with the bill an order of the attendant accompanying the horses requiring such service.

Held, that the service having been rendered in accordance with the orders of the attendant, the charges should be paid.

(Comp. Treas., Dec. 1, 1916.)

MEDICAL RESERVE CORPS: Purchase of Ordnance, etc., by members not in active service, of doubtful legality—but members of Officers' Reserve Corps may purchase.

On inquiry by an officer of the Medical Reserve Corps as to his right to purchase from the Ordnance Department a Springfield rifle, etc., for use in big game hunting.

Held, that as the Act of March 4, 1911, which created the Medical Reserve Corps, conferred upon the holders of commissions issued thereunder "all authority, rights and privileges of commissioned officers of the like grade in the Medical Corps of the Army, except promotion, *but only when called into active duty*," and that, as section 37 of the National Defense Act makes officers of the Medical Reserve Corps eligible for appointment to the Medical section of the Officers' Reserve Corps, and further that the "Medical Reserve Corps as now constituted by law" shall "cease to exist one year after the passage" of the National Defense Act, the sale of ordnance or ordnance property to officers as members of the Medical Reserve Corps, such officers not being in active service, would be of doubtful legality, and *recommended* that such sale be not made when the officer will not be appointed to the Officers' Reserve Corps.

Held further, that Paragraph 1520, Army Regulations, as to sales of ordnance, etc., to officers, etc., is sufficiently broad to include members of the Officers' Reserve Corps. This accords, in principle, with the opinion of the Judge Advocate General of November 9, 1916, to the effect that as the Officers' Reserve Corps is an integral part of the Army of the United States as established by section 1 of the National Defense Act, its members are entitled to purchase uniforms, clothing and equipage under Paragraph 1174, Army Regulations.

(6-301, J. A. G., Dec. 23, 1916.)

NATIONAL GUARD: Commission of officer expiring while he is in the Federal service.

Section 73 of the National Defense Act provides:

"Commissioned officers of the National Guard of the several States, Territories and the District of Columbia now serving under commissions regularly issued shall continue in office, as officers of the National Guard, without the issuance of new commissions," upon taking the prescribed oath.

Held, that this provision operates only to render effective in the National Guard commissions issued by a State and does not prolong the officer's commission, and that a National Guard officer in the service of the United States can not, under existing law, be compelled to continue in the service of the United States as an officer of the National Guard after the expiration of his commission.

(58-100, J. A. G., Dec. 6, 1916.)

(58-241, J. A. G., Dec. 8, 1916.)

NATIONAL GUARD: Furlough of enlisten men to the Reserve.

The following questions were submitted:

(a) "Can a member of the National Guard be furloughed to the reserve before the end of the active service period?"

OFFICERS' RESERVE CORPS: Assignment of members as disbursing officers when ordered to active duty.

The question was presented whether reserve officers of the Aviation Section of the Signal Corps, ordered to active duty, may legally be assigned to duty as disbursing officers.

Held, that reserve officers, when ordered to active duty in accordance with Sections 37 and 39 of the National Defense Act "for duty with troops," may, while in active service for such duty, be assigned to any duty in connection with such troops to which Regular Army officers serving therewith may be assigned, including duty as disbursing officers.

(6-228.1, J. A. G., Dec. 19, 1916.)

TRAVEL EXPENSES: Officer on duty in connection with National Guard.

Section 67 of the National Defense Act provides for the payment, from the Federal appropriations for the National Guard, of the "actual and necessary expenses incurred by officers and enlisted men of the Regular Army when traveling on duty in connection with the National Guard." In the case of an officer of the Ordnance Department directed to make an inspection of field artillery material in the hands of the National Guard.

Held, that he was entitled to actual expenses of travel, and not mileage, for travel in the performance of such duty, payable from the \$2,000 appropriation for "inspection of material pertaining to Field Artillery and Signal Corps in the hands of the National Guard" (39 Stat., 647.)

(94-210, J. A. G., Dec. 4, 1916.)

UNIFORM: Wearing of, by civilians of Army Young Men's Christian Association.

Section 125 of the National Defense Act prohibits the wearing of the uniform of the Army, Navy or Marine Corps, or any distinctive part thereof, or a uniform any part of which is similar to a distinctive part of the uniform, unless the wearer be a member of the United States Army, Navy or Marine Corps, providing, however, that certain military and quasi-military organizations such as "members of the organizations known as the Boy Scouts of America, or the Naval Militia, or such other organizations as the Secretary of War may designate," shall be excepted from the prohibition.

Held, that, as the organizations that are expressly named as excepted are either military or quasi-military, and in view of the rule of associated words, it was the intention of Congress that the Secretary of War's authority to designate other organizations should be limited to those of a similar character, and that the Secretary of War is, therefore, not authorized to designate the Army Young Men's Christian Association as an organization exempt from the provisions of section 125 of the National Defense Act.

(96-140, J. A. G., Dec. 23, 1916.)

Organized Militia called out in the national defense where the man, at his own request and for his own convenience, was permitted to leave the military hospital to go to his home, and thereafter entered the private hospital on his own responsibility.

(Comp. Treas., Dec. 15, 1916.)

NATIONAL GUARD: Officers entitled to leaves of absence.

An officer of the National Guard included in the President's call for Federal service who has taken the new National Guard oath prescribed by the Act of June 3, 1916, or has been mustered into the Federal service, is entitled to the benefits of the leave laws applicable to officers of the Regular Army from the time that he reported at his company rendezvous in response to the call of the President.

(Comp. Treas., Dec. 4, 1916.)

NATIONAL GUARD: Pay of soldiers rejected by State authorities before muster-in.

A private of the National Guard who responded to the President's call of June 18, 1916, reporting at company rendezvous June 19, was subsequently, before muster-in, examined by the State authorities June 3, 1916, and rejected. The question was submitted whether he was entitled to pay from Federal funds in view of the fact that he was examined and discharged without ever having been presented to the United States mustering officer.

Held, that the soldier was entitled to pay from the date he reported at his company rendezvous in response to the President's call, and that the State authorities being unauthorized after the call to discharge him their action in rejecting the soldier was without legal force and effect, but might be confirmed by the Federal authorities, in which event his right to pay would terminate on the date of his rejection by the State authorities.

(Comp. Treas., Dec. 19, 1916.)

TRANSPORTATION: Land grant; shipment of officers' private mounts.

The transportation rates for the shipment of officers' private mounts which they are required to keep for use in the military service are subject to land grant deduction; the decisions with respect to shipment of officers' household goods, to the effect that the rates therefor are not subject to land grant deductions, not being applicable to horses which are required to be kept for military service.

(Comp. Treas., Dec. 11, 1916.)

National Guard between the ages of nineteen and twenty-two years who have served as enlisted men not less than one year, to be selected under such regulations as the President may prescribe."

Held, that to satisfy the requirements of the statute the prior service must have been rendered in that branch from which the application is made.

(6-142, J. A. G., Jan. 18, 1917.)

ENLISTED MEN: Appointment of sergeants, limited warrant, in provisional ambulance companies.

A lance corporal in a provisional ambulance company, with the Mexican Punitive Expedition, having passed an examination for appointment as sergeant, Medical Department, limited warrant, the question was presented as to the legality of making such appointment.

Held, that such appointments may properly be made in provisional ambulance companies the organization of which has been authorized or approved by the Secretary of War.

(6-227.1, J. A. G., Nov. 17, 1916.)

ENLISTED MEN: Lance corporals.

The question was presented as to the propriety of appointing a lance corporal, in an Infantry supply company, from the grade of wagoner, in view of the fact that the personnel of such company does not include the grade of private.

Held, that such appointment may not be made, so long as paragraph 272, A. R., 1913, authorizes only "privates" to be so appointed.

(6-151.1, J. A. G., Jan. 12, 1917.)

MILITARY ACADEMY: Appointment of cadets.

The question was presented whether enlisted service in the Navy may be counted in determining the eligibility of an enlisted man in the Regular Army for appointment to the Military Academy under the provisions of section 2 of the act of May 4, 1916, authorizing appointment as cadets of enlisted men of the Regular Army and National Guard "who have served as enlisted men not less than one year."

Held, that the statute contemplates a year's service in one or the other of the forces named, and that service as an enlisted man in the Navy could not be counted for the purposes of the act.

(6-141, J. A. G., Dec. 4, 1916.)

NATIONAL GUARD: Enlisted men, discharge.

An enlisted man of the New York National Guard had served, on March 15, 1915, five years, the term of his enlistment, after deducting the time he was "dropped," which under the provisions of the State law may be done without terminating service. Not having been dis-

visions of paragraph 824, Army Regulations, on the subject, and in line with the practice common to the several Executive Departments, the request should not be complied with—an additional reason being that the Department of Justice would be called upon to defend a suit based on the claim, and might be embarrassed by the conclusions of the board.

(66-124, J. A. G., Jan. 12, 1917.)

POST EXCHANGES: Settlement of disputes between exchanges and creditors.

A post exchange of a National Guard regiment in the service of the United States purchased certain supplies, which were returned to the vendor for credit on account when the regiment was ordered mustered out of the Federal service. The vendor refused to accept the goods returned, asserting that they were not purchased with that understanding, while the post exchange officer insisted that all the exchange's goods were purchased with the distinct understanding that they were to be returned in the event of the muster-out of the regiment. The vendor appealed to the War Department.

Held, that it is not the policy of the War Department to interfere in the contractual relations between post exchanges and their creditors where there is a bona fide dispute which appears to be a proper case for judicial determination, and that no action could be taken in the instant case for the further reason that the regiment to which the post exchange belonged had been mustered out of the Federal service and its officers had passed primarily beyond the control of the War Department.

(40-100, J. A. G., Jan. 2, 1917.)

PUBLIC PROPERTY: Liability of ship owner for loss or damage of, at sea.

In the case of two Army mules lost at sea from a commercial vessel upon which they were being shipped by the Quartermaster Corps, the steamship company claimed exemption from liability on the ground that the loss was due to dangers of the sea, the mules having been washed overboard from the deck, where they were stowed in cattle stalls when the vessel "shipped a succession of heavy seas."

Held, that under the Harter Act (27 Stat., 445) it was incumbent upon the vessel owner to show that it exercised due diligence to make the vessel seaworthy before commencement of the voyage, including the deck structure for securing the mules, and that in the absence of proof of the exercise by the company of due diligence to make the vessel in all respects seaworthy, as required by the Harter Act, the company could not be exempted from liability for the loss.

(76-700, J. A. G., Jan. 22, 1917.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

CLAIMS: Additional payment after final settlement, jurisdiction.

Upon making payment under a contract for furnishing a machine lathe according to specifications, the sum of \$6.07 was deducted for

that is to be reduced to writing and if a clerk or some other agent makes a mistake we perceive no reason why the writing should not

be made to conform to the fact. * * * There was a mistake made by a clerk in not striking out a printed clause from that requisition. It is as if a principal, after making the agreement, had taken a printed form and forgotten to draw his pen through the words. The failure of the contractor to read before signing an instrument, the terms of which he had seen in print, is not enough to debar him from seeking relief."

In reference to the contractor's further claim for the recovery back of port charges levied against his vessels at Manila on the ground that the Philippine tariff act of March 3, 1905, exempts from such charges "a vessel belonging to or employed in the service of the Government of the United States,"

Held, that the words quoted do not mean every vessel that carries a ton or a cargo of coal for the Government but only one that is under the control of the United States, and is an agency of the Government, and that therefore the contractor's vessels did not come within the meaning of the provision.

(*Ackerlind v. United States*, decided by U. S. Sup. Ct., Apr. 3, 1916.)

PUBLIC PROPERTY: Damage to.

In a suit by the United States in admiralty against the owner of a vessel for injuries to a Government cable,

Held, by the court, that as the evidence showed that the damage was the result of negligence in the management of the vessel, there should be a decree for the Government unless the claim of the owner of the vessel that, owing to the character of the property injured, admiralty was without jurisdiction, was sound. Upon the latter point, *Held*, that under the authorities the location of the cable is controlling and gives it a maritime relation; and that since the injuries were done in the operation of navigation to a cable while occupying some portions of the navigable channel, the matter came within the admiralty jurisdiction.

(*United States v. North-German Lloyd*, District Court, So. Dist. of N. Y., Jan. 13, 1917.)

not as compensation but to promote the performance of his military duty, is not an allowance, and so may be issued without express statutory authority.

(80-130, J. A. G., Feb. 14, 1917.)

BONDS: Cancellation of.

Upon the question raised as to the authority of the Secretary of War to surrender a bond, which had been accepted by him in the exercise of his discretion under a statute, upon the city furnishing a bond in a reduced penalty deemed sufficient for the purpose.

Held, in accordance with the practice of the several executive departments, that, in the absence of authority from Congress, executive officers have no authority to surrender or release obligations of the United States; that upon the acceptance of the bond the United States acquired certain rights as obligee; and that the principle is that no executive officer, without authority of law, can surrender or waive such rights. While the United States has the same powers in respect to contracts that private persons have (*U. S. v. Smith*, 194 U. S., 218) the principle is that its officers or agents do not possess plenary powers (8 Comp. Dec., 106), and can not, without authority from Congress, surrender or waive the rights of the Government (citing 4, Opin. Atty. Gen., 312). While the Secretary of War may, if he deems the security insufficient, require further security, he may not, therefore, without authority of Congress, release security which has been accepted.

(12-332, J. A. G., Jan. 3, 1917.)

CIVIL AUTHORITIES: Expenses for detention of soldier.

Where a soldier absent without leave was arrested by the chief of police of a town, who notified the military authorities thereof, and was instructed to hold him until the arrival of a guard sent to conduct the soldier back to his post,

Held, that the chief of police was entitled to reimbursement for expense incurred by him in connection with the arrest and detention of the soldier, such arrest having been ratified by the request of the military authorities that he be held, and that there being no other appropriation available therefor payment could be authorized by the Secretary of War from the appropriation for contingencies of the Army.

(26-200, J. A. G., Jan. 3, 1917.)

CONTRACTS: Advertising for bids.

The city of New York had appropriated \$95,000 to fill in certain marsh lands which it held adjacent to other marsh lands owned by the Government on a military reservation in New York Harbor. It offered to enter into a contract with the Government to fill in at the same time, and at the actual cost of the work, the said Government marsh lands, the estimated cost of the work required to be done on

militia on their muster into the Federal service against the initial allowance of the men, submitted the following questions:

(a) Whether the interpretation of the law as given in the said opinion is not in violation of paragraph 460, Army Regulations?

(b) Whether it does not have the effect of requiring the full price of clothing issued to the State and brought with the National Guard or Organized Militia into the Federal service to be charged against the initial allowance of the enlisted men?

Held, with reference to (a), that the requirement as stated in the said opinion of the Judge Advocate General is contrary to the terms of the regulation, but that the law requires that the militia while in the Federal service *shall receive the same pay and allowances* as Regular troops, and as Regular troops are charged with the clothing supplied to them on enlistment, it follows that the clothing with which the militia is supplied when entering the Federal service, the clothing having been furnished by the Government, must be charged to them; that the requirement of the regulation, being inconsistent with the law, must give way to the law.

Held, with respect to (b), that the opinion of this office under consideration does not require the clothing to be charged at the full issue price of the same, but that if the clothing is worn it should be charged at a reduced price fixed by a surveying officer in view of its condition at the time.

(72-420.2, J. A. G., Dec. 15, 1916.)

NATIONAL GUARD: Property shortages.

On the question as to the action which should be taken to relieve the hardships involved in holding up the final pay accounts of officers of the National Guard or Organized Militia pending the determination of their responsibility for shortages of public property.

Held, that the question of the accountability for public property is one to be determined by the Secretary of War under the act of March 29, 1894 (28 Stat., 457); that there is, therefore, no legal objection to modifying the regulations so as to relieve the hardships complained of so far as practicable; and that such hardships can be relieved, with due regard to the interests of the United States, by modifying the regulations so as to permit of settlement as follows:

(a) As to officers of the Organized Militia or National Guard who, after their muster out, have the status of officers of the National Guard as organized under the act of June 3, 1916, final payment to be made as soon as the status of the complainant as an officer of the National Guard is fixed—the Government being secured by the right to withhold pay accruing to the officer as an officer of the National Guard for any shortages in respect of which it may be finally determined he is chargeable.

(b) As to officers of the Organized Militia who, upon their muster out, do not assume the status of officers of the National Guard as organized under the act of June 3, 1916, partial payments be made withholding only the amount for which the preliminary report indicates that the officer is properly accountable, such partial payment to be made when the complainant has signed a certificate to the effect that all property for which he is accountable or responsible has been

Held, that section 69, relating to the period of enlistment, and section 70, prescribing the oath of enlistment, as well as other sections of the national-defense act, indicate clearly that the term "National Guard" includes an active and a reserve force, and that unless the context indicates a different meaning the term "National Guard" should be construed as including the National Guard Reserve. The question was answered in the affirmative.

(64-213.3, J. A. G., Feb. 3, 1917.)

POSSE COMITATUS: Regular officers serving under commissions in National Guard.

On the question raised as to whether section 15 of the act of June 18, 1878 (20 Stat., 152), forbidding the employment of any part of the Army as a *posse comitatus* or otherwise to enforce the laws, except where expressly authorized by Congress, would preclude an officer of the Regular Army serving under a commission in the National Guard from serving with the National Guard in case of an emergency causing the governor to call out the same.

Held, that as section 100 of the national-defense act, approved June 3, 1916, authorizes officers of the Regular Army detailed to duty with the National Guard to "accept commissions in the National Guard, with the permission of the President, determinable in his discretion," and as section 61 of the same act recognizes the rights of the States "in the use of the National Guard within their respective borders in time of peace," the service of the regular officer under his commission as an officer of the National Guard would not be a violation of the *posse comitatus* act; that while holding a commission in the National Guard under authority of the act of June 3, 1916, he would be under orders of the governor of the State, and for the time being his status as a regular officer would be in abeyance; and that as an officer of the National Guard he would be subject to the lawful orders of the governor of the State.

(64-312.4, J. A. G., Jan. 18, 1917.)

PUBLIC PROPERTY: Lease of.

Bids having been invited for the lease of grazing privileges on a target and maneuver reservation, under the act of July 28, 1892, on the question raised whether it would be legal to pass over the highest bid in favor of the alternative bid of another bidder containing conditions materially different from those stated in the advertisement,

Held, that, if the legality of the proposed action be tested by the decisions under statutes regarding advertising in the making of Government contracts, it would not be legal to accept the alternative bid, but that as the Secretary of War in making leases under this statute may advertise or not, in his discretion, it would not be illegal to accept the alternative bid. Upon submission of the question to the Secretary of War for decision as to the course to be adopted in this class of cases, it was ordered that the highest legal bid be accepted after advertising in the present and future cases.

(80-722, J. A. G., Feb. 10, 1917.)

Held, that the language of the section referred to defines the Veterinary Corps as consisting of "said veterinarians and assistant veterinarians," and these words can relate only to the veterinarians and assistant veterinarians whose appointments have been provided for in the preceding clauses. The words, "including veterinarians now in the service," are employed in the section only for the purposes (1) of limiting the number of officers who may be appointed veterinarians and assistant veterinarians under the terms of the section, and (2) of indicating that the discharge of veterinarians then in the service was not required; and do not have the effect of including the "veterinarians now in the service" in the Veterinary Corps, which the section plainly constitutes through new appointment.

(6-133, J. A. G., Jan. 26, 1917.)

SUPPLY COMPANY: Commanding officer of.

A captain of Infantry was appointed quartermaster of his regiment on March 17, 1913, effective March 18, 1913, and served continuously as quartermaster and commanding officer of the supply company. Upon inquiry by the commanding officer of the regiment as to whether he must be relieved from such duty on March 17, 1917,

Held, that the commanding officer of the supply company in an Infantry regiment is a staff officer within the meaning of Army Regulations 249, and his tour of duty as such, taken in connection with any prior service as a regimental staff officer, can not exceed four years.

(6-124.23, J. A. G., Feb. 17, 1917.)

DECISIONS OF THE COMPTROLLER OF THE TREASURY.

(Digests prepared in the office of the Judge Advocate General.)

APPROPRIATIONS: Proceeds from sale of unsuitable quartermaster stores.

It was proposed to sell, after due public notice, a large quantity of nonregulation shoes purchased in the emergency of the mobilization of the National Guard, but never issued because it became possible to obtain shoes of the regulation pattern, and the question was presented whether the proceeds from such a sale could be deposited to the credit of the appropriation from which the shoes were purchased.

Held, that the act of March 23, 1910 (33 Stat., 257), relating to the deposit of proceeds from sales of serviceable supplies or stores is not an authority for the *sale* of property, nor does it apply to property sold to the general public; that there exists no authority of law for the sale of *serviceable* quartermaster supplies to the public generally, and that if the shoes be classed as "unsuitable for the public service" and sold as provided by section 1241, Revised Statutes, the proceeds must, under the general legislation in section 3618, Revised Statutes, be covered into the Treasury as miscellaneous receipts.

(Comp. of the Treas., Feb. 19, 1917.)

to make the Government liable for such risks as are common to persons in civil life.

(23 Comp. Dec., 411.)

COMPTROLLER OF THE TREASURY: Jurisdiction.

In the case of a disallowance by the auditor of \$13.75 in a disbursing officer's accounts on account of an alleged overpayment to another officer, the latter refunded the amount upon the request of the disbursing officer but at the same time requested that the case be submitted to the comptroller for a review of the auditor's action. The War Department having complied with the officer's request,

Held, by the comptroller, that the refundment having been made, the auditor was authorized to credit the disbursing officer's accounts with the sum so refunded, and that there was therefore no ground for an appeal as to such settlement. Advised, however, that the papers would be forwarded to the auditor who had authority to settle the officer's claim for repayment of the sum refunded by him, and that if after such settlement the officer be dissatisfied with the auditor's action he could appeal to the comptroller.

(Comp. Treas., Jan. 29, 1917.)

DECISIONS OF THE COURTS.

(Digests prepared in the office of the Judge Advocate General.)

HORSES: Claims for loss of, in military service.

In a decision of the Court of Claims of January 17, 1916, in *Griffis v. United States*, it was held, overruling decision in the *Hardie case* (39 C. Cls., 250), that section 3482, Revised Statutes, as amended by the act of June 22, 1874, and subsequent acts, authorizing the reimbursement of officers for horses lost in the military service, had expired by limitation and no longer authorized such reimbursement. (Bul. No. 8, W. D., 1916, p. 13.) Upon a rehearing,

Held, That only for the purposes of the act of 1874 was section 3482, Revised Statutes, amended, and that after the act of 1874 expired by its limitation, section 3482, Revised Statutes, continued in force unaffected by the 1874 act and still remains in force. The former opinion in this case was modified accordingly. Section 3482, Revised Statutes, authorizes payment for horses killed in battle or lost under certain other described contingencies.

(*Frank C. Griffis v. United States*, decided by C. Cls., Feb. 5, 1917.)

PRIVATE PROPERTY: Destruction of by military forces.

Where militia troops were ordered out by the governor of a State for the purpose of restoring peace and order in a county declared by him to be in a state of insurrection, and the commanding officer of the militia ordered all saloons closed in a city in the troubled area between 7 p. m. and 8 a. m., with the warning that "the stock of liquors of any person or persons violating this rule will be destroyed

BULLETIN 18.

BULLETIN }
No. 18. }

WAR DEPARTMENT,
WASHINGTON, *April 6, 1917.*

The following digest of opinions of the Judge Advocate General of the Army, for the month of March, 1917, and of certain decisions of the Comptroller of the Treasury and of courts, together with notes on military justice prepared under the direction of the Judge Advocate General, and a compilation of Federal and State laws prohibiting discrimination against the uniform, is published for the information of the service in general.

[2526413 B—A. G. O.]

BY ORDER OF THE SECRETARY OF WAR:

H. L. SCOTT,
Major General, Chief of Staff.

OFFICIAL:

H. P. McCAIN,
The Adjutant General.

OPINIONS OF THE JUDGE ADVOCATE GENERAL.

AVIATION PAY: Officers' Reserve Corps.

Upon reference for opinion as to whether or not officers of the aviation section, Signal Officers' Reserve Corps, when assigned to duty requiring them to make regular and frequent aerial flights, are entitled to the extra pay authorized under section 13 of the national defense act, approved June 3, 1916.

Held, that as section 39 of the same act provides that Reserve Corps officers, when ordered "to duty with troops or at field exercises, or for instruction," when provision is made therefor, shall, while so serving, "receive the pay and allowances of their respective grades in the Regular Army," and as section 13 of said act specifically provides, with respect to aviation officers, that "each aviation officer authorized by this act shall, while on duty that requires him to participate regularly and frequently in aerial flights, receive an increase of twenty-five per centum in the pay of his grade and length of service under his commission," a Reserve Corps officer of the aviation section assigned to active duty requiring him to make regular and frequent aerial flights is entitled to receive the increased pay authorized for such duty, as such officer comes within the description, "each aviation officer authorized by this act."

(6-301, J. A. G., Mar. 12, 1917.)

CHAUFFEURS: Procurement of local licenses.

The decision of the Comptroller of the Treasury dated January 10, 1917 (23 Comp. Dec., 286), is conclusive that existing Federal appro-

nished by the Government failed, and it became necessary to use the automobiles belonging to the State and to individuals and organizations in the service of the United States and they were so used in pursuance of competent orders, under such circumstances the expenses for their maintenance and operation would be a proper charge against the Government and payable from Army appropriations. Such obligation would arise under an implied contract, and no formal contract *nunc pro tunc*, such as suggested in this case would be necessary. But in no case where there was not an absolute emergency which required the practical taking over of the motor cars by the United States for operation under its supervision can reimbursement legally be made for any expense in connection therewith.

(18-600, J. A. G., Feb. 24, 1917.)

CONTRACTS: Extra work due to faulty design.

The contractors for the construction of a wharf submitted a claim for extra work required, before the completion of the wharf, to repair damages thereto caused by the sliding of the bank carrying the footings of the piles outward, causing the outer end of the wharf to settle below the required grade. At the time of the damage the wharf was completed, with the exception of certain braces, which could not be placed within the contract period because of the high water. The wharf was constructed strictly in accordance with the specifications and at the location designated by the post quartermaster. The contractors were required, against their protest, to remove the damaged portion of the wharf and rebuild the same strictly in accordance with the contract, and they have submitted their claim covering the extra work involved, on the ground that they were in no way responsible for the loss. The district engineer officer reports that the completed wharf, while not in immediate danger of loss, is liable to settle after each high water, and that it will probably be necessary to uncouple the floor of the same and raise it each year.

Held, in view of the facts stated above, that the case is one where the damages appear to be the result of defective design, and that there being nothing in the contract which could be fairly construed as making the contractors responsible for the design, the extra work was due to the fault of the Government in requiring the work to be done on plans which were defective for the location selected; citing 9 C. J., 752, and 8 L. R. A., N. S., 1171.

(76-700, J. A. G., Mar. 23, 1917.)

CONTRACTORS: Relief of.

A contractor for furnishing packing and waste applied for the cancellation of its contract on the ground that following the making thereof the demand for skilled labor and for the materials required for filling the contract, due to the continuation of the war in Europe, made it practically impossible for the contractor to execute the contract, and that the contractor, a company of limited means, would be required to suspend business unless relief be granted. The contract was an absolute one, binding the contractor to furnish the sup-

discharge, he is entitled, in case he recovers and reenlists, to the benefits of the act of May 11, 1908 (35 Stat., 110), relating to continuous-service pay and bonus for reenlistment, according to the conditions therein prescribed.

(72-220, J. A. G., Mar. 22, 1917.)

ENLISTED MEN: Examination for commission, National Guard service.

On the question whether an enlisted man of the National Guard, proposing to transfer to the Regular Army, could count his National Guard service as a part of the required service to qualify him for the examination.

Held, that while the act of July 30, 1892 (27 Stat., 336), specified service "in the Army," the service described by this term undoubtedly meant service in the Regular Army, and that Federal service by a National Guard soldier can not therefore be credited to qualify the soldier for the examination. This view is supported by the act of February 2, 1901, section 28 of which provides for the same recognition to be given to volunteer as to regular service, a provision which would be unnecessary if the term "in the Army" does not mean service in the Regular Army, inasmuch as the act of April 22, 1898 (30 Stat., 361), defines the term "Army" as including the Volunteer Army.

(64-213, 64-310, J. A. G., Mar. 3, 1917.)

ENLISTED RESERVE CORPS: Pay of civil employee.

On the question whether a civil employee of the War Department who enlists in the Engineer Enlisted Reserve Corps can be given leave of absence with pay in his civil status while he is receiving training as a member of said corps and at the same time receive pay in his military status,

Held, that there can be no legal objection to his receiving the compensation of both places if the training is performed within his annual leave allowance, provided the combined compensation of both places does not exceed the sum of \$2,000, so as to come within the prohibition of section 6 of the act of May 10, 1916, as amended (39 Stat., 582); that as the two positions are entirely distinct, each with its own compensation and duties, the case does not come within the prohibition of sections 1763, 1764, and 1765, Revised Statutes; and that the military position is not an office within the meaning of the act of July 31, 1894 (28 Stat., 205), so as to preclude a civil employee, if his salary should be \$2,500 or more, from being a member of the Enlisted Reserve Corps.

(6-302, J. A. G., Mar. 8, 1917.)

LIGHTHOUSE SERVICE: Status of employees upon being transferred to the War Department in time of national emergency.

In case of a transfer of the Lighthouse Service to the War Department in time of national emergency, as provided by the act of August 29, 1916 (39 Stat., 602),

national defense act of June 3, 1916, authorizing the transfer between branches of the line of the Army for the purpose of lessening inequalities of promotion due to increases under said act,

Held, that such transfer is not authorized. While engineer officers serving with engineer troops are a part of the line of the Army, section 22 of the act of February 2, 1901, prescribing that "the enlisted force of the Corps of Engineers and the officers serving therewith shall constitute a part of the line of the Army," they hold their offices in the Corps of Engineers and are merely detailed on duty with troops; that such vacancies as may be said to occur in the commissioned personnel of troop organizations are not filled by appointment to office but by the detail of a person holding office in the Corps of Engineers; and that the transfer of a line officer to the Corps of Engineers would not fill a vacant office in the line, but would fill a vacant office in a staff corps.

(6-226, J. A. G., Mar. 24, 1917.)

OFFICERS: Transfer of; personal examination.

On the question whether section 25 of the national defense act of June 3, 1916, in prescribing a "personal examination" by the examining board "of such officer and of his official record," requires the bodily presence of the officer before the board, it being pointed out that such interpretation would involve in many cases extensive journeys at very great expense,

Held, that the word "personal" may be used either subjectively or objectively; that, with reference to the official record, the word is evidently used subjectively and relates to the board, and that if the word is so construed with reference to the officer it would not require the bodily presence of the candidate. As the meaning of the term is doubtful, in deference to the rule that where the language is doubtful a construction which gives it reasonable effect is preferred to one which results in very great inconvenience (*United States v. Fisher*, 2 Cranch, 286), the statute in this case should be construed so as not to require a candidate to appear in person before the board which makes recommendations as to his transfer.

(64-221.4, J. A. G., Mar. 12, 1917.)

OFFICERS, DENTAL CORPS: Retirement of, upon failure to pass physical examination for promotion.

The question was presented as to the proper disposition of a first lieutenant, Dental Corps, who appeared before an examining board to determine his fitness for promotion under the provisions of section 10 of the national-defense act and was found by the board to be disqualified both physically and mentally.

Held, that under the provision of said section which makes applicable to him "all laws relating to the examination of officers of the Medical Corps for promotion," he is, by reason of having failed to pass his physical examination for promotion, entitled to be retired with the rank of captain.

(6-227.3, J. A. G., Mar. 20, 1917.)

sion, his employment, however, being continuous and for an indefinite period.

Held, that he was entitled to the same right to pay for holidays as if his employment had been permanent, the words "temporary" and "permanent" in such cases having relation to the civil service status and not necessarily to the continuity or permanence of the employment.

(Comp. Treas., Mar. 10, 1917.)

CLAIMS: Rental for lands purchased, between date of execution of deed and of final payment.

Where the United States is in possession of land under an annual lease, and during the life of the lease the land is purchased and deed executed but payment is not made until several months thereafter owing to delay in the approval of the title papers by the Attorney General,

Held, that the delivery of the deed of conveyance changed the relation of the parties from landlord and tenant to that of vendor and vendee; that upon final acceptance by the United States the title related back to the date of the delivery of the deed, and that therefore payment of a claim for rental was not authorized, since the United States could not be expected to pay rent on property of which it held the title.

(Comp. Treas., Mar. 12, 1917.)

CONTRACTS: Purchase of supplies for Army in absence of appropriations.

In case of the purchase of supplies, etc., for the Army, under section 3732, Revised Statutes, as amended (34 Stat., 255), in the absence of appropriations,

Held, that there is no objection to the delivery of vouchers therefor to the contractors bearing a dated and signed statement to the following effect:

"This account is not payable at this time by reason of the fact that no funds are now available, owing to the failure of Congress to pass the general deficiency bill. Payment will be made to the contractor named on the voucher when funds become available. This is the original voucher, and no other voucher will be issued covering this transaction except on conclusive proof of the loss of the original."

Further suggested, as the better plan, that any claim or so-called voucher should be sent to the Auditor for the War Department for settlement, in which case the auditor "can certify the amount due and transmit his certificate to the Secretary of the Treasury immediately. The claimant can then be furnished a certified copy of the auditor's certificate, which will be evidence that he has a certain, liquidated, and conclusive balance due from the United States, payable immediately upon the making of an appropriation by law. The fact as to future appropriations will appear in the certificate."

(Comp. Dec., Mar. 22, 1917.)

DEATH GRATUITY STATUTE: Not applicable to Army Nurse Corps.

The act of May 11, 1908, as amended (35 Stat., 108; *id.* 735), relating to the payment of death gratuities under the conditions therein

Held, that no claim having been made within the time fixed by the statute, the court was without jurisdiction.

(*Thomas C. Goodman v. The United States*, decided by Court of Claims, Feb. 26, 1917.)

EVIDENCE: Corroboration in case of confession.

On the trial of a defendant for knowingly receiving in pledge from a soldier an automatic pistol, the property of the United States, in violation of section 35 of the Federal criminal code,

Held, that the confession of the defendant that he received the pistol in pledge from a soldier was sufficiently corroborated to justify the submission of the case to the jury by evidence showing that the pistol was issued to a soldier, and that it was found in the possession of defendant, whose place of business was very near the reservation on which such soldier was stationed; and further, that evidence that the pistol was found in defendant's possession was sufficient to sustain a verdict of guilty under Revised Statutes 1242 and 3748.

Held further, that evidence offered by defendant to show that the pistol had been charged to the soldier was properly excluded where the evidence did not show that he was the owner at the time it was pledged, but that the charge was made after its loss was known.

(*Bolland v. United States*, 238 Fed., 529.)

PUBLIC PROPERTY: Appropriation of, to private use.

An applicant for enlistment, who falsely represented that he had had no previous service in the Army and was furnished subsistence and transportation to the recruit depot where it was ascertained that he had been dishonorably discharged from the Army and was not eligible for reenlistment, was indicted for applying to his own use subsistence and supplies furnished to be used for military service, in violation of section 36 of the Federal Criminal Code, which declares:

"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished." etc. Upon a demurrer,

Held, by the court, that the charge against defendant did not constitute a violation of the statute; that the section does not apply to one who has used the property for the very purpose for which it was given; that is to say, one who has used for the purpose of subsistence the property given him for subsistence and has used for transportation to a designated place the property given him to be used for transportation to that place.

(*U. S. v. Buchanan*, 238 Fed., 877.)

NOTES ON ADMINISTRATION OF MILITARY JUSTICE.

(Prepared under the direction of the Judge Advocate General of the Army upon the review of records of general courts-martial trials.)

SENTENCES: Retention of soldiers, guilty of offenses involving moral turpitude, not favored.

(1) A soldier, who was convicted of forgery and uttering forged instruments on four counts, was sentenced to two months' imprison-

"I should like to call the court's attention to the fact the testimony has brought out the fact that one of the members of the court is vitally interested in this case; he has conducted the search and is absolutely familiar with the details and has probably formed his own opinions in the matter. I appeal to the members of this court who are lawyers that the member of the court is incompetent in that he is biased in the case. We did not know that at the time of the introduction of the facts, otherwise would have objected at the start. We do not think the gentleman is fit to sit on the case, but it has developed since the case opened that a member of the court is incompetent."

The president ruled that it was too late to object to the member sitting on the court, stating that the counsel for the accused had the right to attack the legality of the court at the opening of the case. Counsel insisted on his right to object at that time, and was overruled by the court.

The ruling of the court was error, as the accused would have had the right to enter an objection to any member of the court up to the last minute upon the statement, and proof if required, that the facts upon which the objection was based were not within his knowledge at the time when such objection is ordinarily made. Of course, objection should be made on these grounds as soon as the knowledge upon which it is based has come into the possession of the accused.

FEDERAL AND STATE LAWS PROHIBITING DISCRIMINATION AGAINST THE UNIFORM.

1. UNITED STATES.

Hereafter no proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, the District of Alaska, or insular possession of the United States, shall make, or cause to be made, any discrimination against any person lawfully wearing the uniform of the Army, Navy, Revenue-Cutter Service, or Marine Corps of the United States because of that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars. (Act of Mar. 1, 1911, 36 Stat., 963.)

2. CONNECTICUT.

Every person who shall subject or cause to be subjected any other person to the deprivation of any rights, privileges, or immunities usually enjoyed by the public, on account of membership in the military or naval service of this State or of the United States, or on account of the wearing of the uniform of such service, or who, on account of such membership or the wearing of such uniform, shall deprive any other person of the full and equal enjoyment of any advantages, facilities, accommodations, amusement, or transportation, subject only to the limitations established by law and applicable alike to all persons, or who, on account of such membership or the wearing of such uniform, shall discriminate in the price for the

United States because of that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars. (Acts and resolves, 1911, ch. 460.)

7. MINNESOTA.

It shall be unlawful for any common carrier, innkeeper, or proprietor or lessee of any place of public amusement or entertainment, or any agent, servant, or representative of any such common carrier, innkeeper, proprietor or lessee as aforesaid, to debar from the full and equal enjoyment of the accommodations, advantages, facilities, or privileges of any public conveyance on land or water or any inn or of any place of public amusement or entertainment, any person in service in the Army, Navy, Marine Corps, or Revenue-Cutter Service of the United States, or of the National Guard or naval service of this State, or otherwise in the military or naval service of the United States, or of this State, wearing the uniform prescribed for him at that time or place by law, regulation of the service, or custom, on account of his wearing such uniform, or of his being in such service.

Any person who is debarred from such enjoyment contrary to the provisions of section 3998 of this act shall be entitled to recover in an action on the case from any corporation, association, or person guilty of such violation, his actual damages and \$100 in addition thereto; and evidence that such person debarred was at the time sober, orderly, and willing to pay for such enjoyment in accordance with rates fixed therefor for civilians, shall be prima facie evidence that he was debarred on account of his wearing such uniform or of his being in such service.

Any person violating any provision of this act shall be guilty of a misdemeanor. (General Statutes, 1913, secs. 3998, 3999, 4000.)

8. NEW HAMPSHIRE.

Hereafter no proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the State of New Hampshire shall make or cause to be made any discrimination against any person lawfully wearing a uniform of the Army, Navy, Revenue-Cutter Service, or Marine Corps of the United States, or of the militia of this State, because of that uniform; and any person making or causing to be made such discrimination shall be guilty of a misdemeanor and punishable by a fine not exceeding one hundred dollars. (Public Statutes, Laws, 1911, ch. 140.)

9. NEW YORK.

A person who excludes from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement or resort, any person lawfully wearing the uniform of the Army, Navy, Marine Corps, or Revenue-Cutter Service of the United States because of that uniform, is guilty of a misdemeanor. (Laws, 134th session, 1911, vol. 1, ch. 410.)

Any person who is debarred from such enjoyment contrary to the provisions of section 1 of this act shall be entitled to recover in an action on the case from any corporation, association, or person guilty of such violation, his actual damages and one hundred dollars in addition thereto; and evidence that such person debarred was at the time sober, orderly and willing to pay for such enjoyment in accordance with rates fixed therefor for civilians, shall be prima facie evidence that he was debarred on account of his wearing such uniform or of his being in such service. But nothing in this act shall be construed to conflict with existing laws representing the separation and segregation of the races in this Commonwealth.

Any person violating any provision of this act shall be guilty of a misdemeanor. (Acts of assembly, 1916, ch. 433.)

NOTE.—Sec. 125 of the national defense act (39 Stat., 216) makes it unlawful for any person, not an officer or enlisted man of the United States Army, Navy, or Marine Corps, with certain enumerated exceptions, “to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps,” making the offense punishable by a fine not exceeding \$300 or by imprisonment not exceeding six months or by both such fine and imprisonment. This section was made applicable to the Coast Guard by the act of August 29, 1916 (39 Stat., 649). Similar laws designed to prohibit the wearing of the uniform by anyone not in the military service have been enacted in the following States: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

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ABBREVIATIONS DENOTING ORIGIN OF OPINIONS OR DECISIONS DIGESTED.

At. Gen.....	Attorney General.
Comp.....	Comptroller's decisions.
Ct. Cls.....	Court of Claims.
D. C. App.....	District of Columbia Appeals.
Fed. Ct.....	Federal courts.
J. A. G.....	Judge Advocate General.
St. Ct.....	State courts
Sup. Ct., P. I.....	Supreme Court, Philippine Islands.
Tr. Ct., P. I.....	Trial Court, Philippine Islands.

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